Ozburn-Hessey Logistics, LLC, *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC a/k/a United Steelworkers Union *and* Lauren Keele *and* Stacey Williams. Cases 26-CA-092192, 15-CA-097046, 15-CA-105527, 15-CA-106180, 15-CA-106387, 15-CA-106511, 15–CA–108749, 15-CA-109235, 15-CA-111520, 15-CA-111523, 15-CA-111581, 15–CA–117208, 15–CA–119826, 15–CA–119925, 15–CA–123315, and 15–CA–117208

August 27, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS PEARCE AND MCFERRAN

On April 28, 2015, Administrative Law Judge Keltner W. Locke issued the attached decision. The judge found that the Respondent violated Section 8(a)(5), (3), and (1) of the Act in various ways, and he dismissed a number of complaint allegations. On review of the record in light of the exceptions and briefs,[1] we affirm most of the judge's findings to the extent consistent with this Decision and Order, but for the reasons set forth below, we reverse some of the judge's findings.[2] Moreover, although the judge ordered some additional remedies in an attempt to ensure the effectiveness of his order, we believe even those added measures are insufficient in light of the Respondent's repeated, serious violations of the Act in this case as well as in five previous court-enforced Board decisions.[3] Accordingly, we have modified the judge's recommended remedies and Order to more fully address the Respondent's pattern of egregious misconduct.[4]

Discussion

In 2009, the Union began a campaign to organize workers at the Respondent's Memphis, Tennessee warehouses. A representation election was held on July 27, 2011, and the Union was certified as the exclusive representative of the bargaining-unit employees on May 24, 2013.[5] Most of the allegations in the instant consolidated proceeding involve conduct that occurred immediately after a May 14, 2013 revised tally of ballots showed that the Union had won the 2011 election.[6]

For the reasons stated by the judge, we adopt his conclusions that the Respondent violated Section 8(a)(1) of the Act (1) on May 14, when Operations Manager Mar-

[1] The General Counsel and Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC (the Union) each filed exceptions and a supporting brief, the Respondent filed a combined answering brief to both sets of exceptions, and the General Counsel and the Union each filed a reply brief. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union each filed an answering brief, and the Respondent filed a reply brief.

[2] In the absence of exceptions, we adopt the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by twice informing employees that they were not in the bargaining unit and by discriminatorily drug-testing employees, and Sec. 8(a)(5) by implementing a mandatory exercise program in January 2013. However, as explained below, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by telling employees, on a third occasion, that they were not in the bargaining unit, and Sec. 8(a)(5) by unilaterally implementing a mandatory exercise program in May 2013.

The General Counsel has explicitly, and the Charging Party and Respondent have implicitly, excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the General Counsel's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that these contentions are without merit.

We do not rely on the judge's citations to *Flex-N-Gate Texas*, 358 NLRB 622 (2012), and *Bloomfield Health Care Center*, 352 NLRB 252 (2008), enfd. 372 Fed. Appx. 118 (2d Cir. 2010), decisions that issued at times when the Board was later determined to have lacked a validly appointed quorum. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014); *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). We note that *Vision of Elk River*, 359 NLRB 69 (2012), cited by the judge, was reaffirmed by the Board at 361 NLRB 1395 (2014).

[3] Since the start of the Union's organizing drive in 2009, the Board has issued five decisions finding that the Respondent has violated the National Labor Relations Act, and the Court of Appeals for the District of Columbia Circuit has enforced the Board's order all five times. See *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1456 (2011), enfd. mem. 605 Fed. Appx. 1 (D.C. Cir. 2015); *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632 (2011), enfd. mem. 609 Fed. Appx. 656 (D.C. Cir. 2015); *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921 (2014), incorporating by reference 359 NLRB 1025 (2013), enfd. 833 F.3d 210 (D.C. Cir. 2016); *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 118 (2015), enfd. 833 F.3d 210 (D.C. Cir. 2016); and *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180 (2015), enfd. mem. 689 Fed. Appx. 639 (D.C. Cir. 2016). This is the sixth such decision, demonstrating the Respondent's apparent determination to continue disregarding its legal obligations under the Act.

[4] We have amended the judge's remedy and modified the judge's recommended Order consistent with our findings herein and to conform to the Board's standard remedial language.

[5] Because the Regional Director issued that certification following a decision issued when the Board included two members whose appointments were not valid (*Ozburn-Hessey Logistics, LLC*, 359 NLRB 1025 (2013)), the Board re-certified the Union on November 17, 2014, "in an abundance of caution." *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921, 921 (2014), enfd. 833 F.3d 210 (D.C. Cir. 2016).

[6] All dates are in 2013 unless otherwise noted.

garet Bonner ordered employees Jerry Smith Sr.[7] and Glenora Whitley to leave the Respondent's premises while they were engaged in lawful union solicitation and distribution activities; (2) on May 15, when Director of Operations Phil Smith removed union literature from a break room; and (3) on May 17, when Bonner told employees that if they were unsatisfied with their jobs, they should quit. We also adopt the judge's conclusions, for the reasons he gives, that the Respondent violated Section 8(a)(5) and (1) of the Act by (1) unilaterally implementing a mandatory exercise program in about May 2013; (2) unilaterally implementing an advance-notice requirement for employees requesting time off; (3) unilaterally changing its policy to disallow employees from using paid time off to make up their hours when they are sent home early; (4) unilaterally changing the Shipping Department hours from 8 hours per day, 5 days per week to 11 hours per day, 3 days per week; (5) unilaterally changing the Inventory Department's start time from 4 a.m. to 8 a.m.; (6) unilaterally increasing enforcement of its policy prohibiting employees from leaving the building after clocking in; and (7) refusing to provide requested relevant information to the Union.[8]

We also agree with the judge, for the reasons he states, that the Respondent did not violate Section 8(a)(1) when, (1) on May 14, Bonner allegedly engaged in surveillance of employees' union activities; (2) on May 15, Supervisor Kyle Perkins allegedly engaged in surveillance or created the impression of surveillance of employees' union activity; (3) on May 23, the Respondent denied employee Nannette French's request for a union representative during a meeting to communicate its previous decision to discharge her; (4) on August 30, Phil Smith threatened Smith Sr. with repercussions for distributing union material during work time and disobeying an instruction to cease doing so; and (5) on September 5, the Respondent denied Smith Sr.'s request for a union representative during an investigative interview and chose instead to terminate the interview. We also dismiss complaint allegations, for the reasons given by the judge, that the Respondent violated Section 8(a)(3) and (1) when it issued a final warning to Smith Sr. for distributing union material on work time; suspended and discharged employee Renal Dotson; discharged employees Jerry Smith Jr., Reginald Ishmon, DeAngelo Walker, and Nate Jones; and transferred employee Jennifer Smith to a small-parts picking job and subsequently issued her a final warning.[9]

Below, we discuss the remaining unfair labor practice allegations. As we explain, we agree with the judge that the Respondent did not violate Section 8(a)(1) on May 14 when Operations Manager Antonio Goodloe allegedly engaged in surveillance of employees' union activity.[10] We also agree with the judge that the Respondent did violate Section 8(a)(1) on September 5, when Human Resources Manager Sarah Wright told Smith Sr. that he had no union representation. And we affirm the judge's

[7] There are two Jerry Smiths who are alleged as discriminatees in this case. To avoid confusion and comport with the way witnesses identified them at the hearing, we refer to the elder Jerry Smith (referred to by the judge as "Smith III") as "Smith Sr.," and to his son as "Smith Jr."

[8] Regarding the Sec. 8(a)(5) violations, it is well established that "[w]hen a majority of the unit employees have selected the union as their representative in a Board-conducted election, the obligation to bargain, at least with respect to changes in terms and conditions of employment, commences not on the date of certification, but as of the date of the election." *Alta Vista Regional Hospital*, 357 NLRB 326, 326–327 (2011) (citing *Mike O'Connor Chevrolet-Buick-BMC Co.*, 209 NLRB 701 (1974)), enfd. sub nom. *San Miguel Hospital Corp. v. NLRB*, 697 F.3d 1181 (D.C. Cir. 2012). Accordingly, "an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made." Id. An employer also assumes the risk if it refuses to provide relevant information requested by a union during the pendency of objections or challenges, even if the request is made prior to certification. Id. at 327 (citing *Sunstrand Heat Transfer, Inc. (Triangle Division)*, 221 NLRB 544, 545 (1975), enfd. in relevant part 538 F.2d 1257, 1259 (7th Cir. 1976)). Here, it is undisputed that the Union requested relevant information necessary for bargaining on June 17, 2013—shortly after the Board's initial May 24 certification—and that it had previously requested bargaining. Because the Respondent was obliged to provide relevant requested information and to refrain from making unilateral changes at all times after the July 27, 2011 election, we find it unnecessary to rely on the judge's finding that the Union's certification "relates back" to May 24 or to determine whether the May 24 certification was valid absent the Board's subsequent prophylactic re-certification on November 17, 2014.

[9] The General Counsel further alleged that the Respondent violated Sec. 8(a)(4) when warning Smith Sr. and Jennifer Smith, transferring Jennifer Smith, and suspending and discharging Dotson, because this discipline was also in retaliation for those employees' prior filing of Board charges or giving testimony in Board proceedings. We find that this conduct did not violate Sec. 8(a)(4) for the same reasons we affirm the judge's dismissal of the 8(a)(3) allegations—i.e., the Respondent proved that it would have taken these actions even in the absence of the employees' protected activity. In adopting the judge's dismissal of the allegation regarding Nate Jones, we do not rely on the judge's statement that Jones' refusal to corroborate Director of Operations Phil Smith's version of events regarding the suspension of Smith Sr. was not protected concerted activity. Instead, we adopt the judge's credibility-based finding that Human Resources Manager Shannon Miles, who made the decision to discharge Jones, did not know about Jones' union or protected concerted activity. Accordingly, we decline to impute to Miles any knowledge that other managers may have had of Jones' protected activity. See *Vision of Elk River, Inc.*, 359 NLRB 69, 72 (2012) ("[T]he Board imputes a manager's or supervisor's knowledge of an employee's union activities to the decisionmaker, *unless the employer affirmatively establishes a basis for negating such imputation*.") (emphasis added), incorporated by reference in 361 NLRB 1395 (2014).

[10] Member Pearce would find that Goodloe unlawfully surveilled employees.

conclusion that the Respondent violated Section 8(a)(3) and (1) when it discharged employee Stacey Williams.[11] Contrary to the judge, however, we find that the Respondent also violated Section 8(a)(3) and (1) when it discharged employees Shawn Wade, Nannette French, and Smith Sr.[12] And we find, contrary to the judge, that the Respondent additionally violated Section 8(a)(5) and (1) by unilaterally increasing its contributions to employee 401(k) plans, implementing new timekeeping and leave-request systems, and changing certain employees' start times.[13] Finally, we find that the judge erred by denying the General Counsel's request to amend the complaint to allege that Manager Ken Ball confiscated union literature from employee break rooms, and we find that Ball did so, in violation of Section 8(a)(1). But we find that the judge correctly denied the General Counsel's request to amend the complaint to allege that Ball also violated Section 8(a)(5) and (1) by bypassing the Union to deal directly with employees about contemplated schedule changes.[14]

1. Antonio Goodloe's conduct on May 14

For the following reasons, we agree with the judge that the credited evidence is insufficient to support a finding that Operations Manager Antonio Goodloe surveilled two employees' union activity on May 14 in violation of Section 8(a)(1) of the Act. The judge discredited three employees' accounts pertaining to this allegation, and the Board has adopted the judge's credibility findings. The relevant credited evidence, therefore, consists solely of the testimony of Operations Manager Bonner. Bonner testified that she spoke with two supervisors on the phone that day, one of whom was Goodloe. One or both of the supervisors told her that "two union people" were in the parking lot. Bonner did not testify as to how the supervisors knew that the employees were in the parking lot or in what manner the supervisors observed the employees.

An employer's routine observation of employees openly engaged in union activity on company property does not constitute unlawful surveillance. See, e.g., *Roadway Package System*, 302 NLRB 961, 961 (1991). However, an employer violates Section 8(a)(1) if it surveils employees engaged in union activity by observing them in a way that is out of the ordinary and therefore coercive. See, e.g., *Aladdin Gaming, LLC*, 345 NLRB 585, 585–586 (2005), review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). Here, Bonner's testimony does not establish that Goodloe's observation of the two employees violated the Act. From her testimony, it cannot be concluded that Goodloe did anything other than simply observe two employees openly engaged in union activity in a parking lot typically used by both employees and managers. The credited record evidence does not permit a finding that Goodloe observed the employees in a way that was out of the ordinary and thus coercive. We accordingly affirm the judge's dismissal of this complaint allegation.[15]

2. Sara Wright's September 5 denial that Smith Sr. had union representation rights

We agree with the judge, for the reasons discussed below, that Human Resources Manager Sara Wright violated Section 8(a)(1) by making certain remarks to Smith Sr. during an investigatory interview.

On September 5, management called Smith Sr. to a meeting in Operations Manager David Maxey's office to investigate an August 30 incident in which Smith Sr. had distributed union literature on working time and refused an instruction to cease doing so.[16] Wright was also pre-

[11] Chairman Ring would find Williams' discharge lawful.

[12] Chairman Ring would find French's and Smith Sr.'s discharges lawful.

[13] Chairman Ring would find the implementation of a new timekeeping and leave-request system lawful.

[14] Member Pearce would permit the direct-dealing complaint allegation and find that the record establishes that violation.

[15] The complaint also alleged that Goodloe unlawfully ordered employees engaged in lawful union solicitation and distribution to leave a company parking lot. We have unanimously adopted the judge's finding that the Respondent violated Sec. 8(a)(1) when Manager Bonner ordered employees Smith Sr. and Whitley to leave the company lot shortly after Goodloe's alleged interactions with the employees. We thus find it unnecessary to pass on the additional allegation that Goodloe's order also violated the Act, as finding that violation would not affect the remedy and therefore would be merely cumulative.

Contrary to his colleagues, Member Pearce would find that Goodloe violated Sec. 8(a)(1) by unlawfully surveilling Smith Sr. and Whitley on May 14 while they were engaged in protected activity. In Member Pearce's view, whatever lack of confidence the judge expressed about the employees' testimony is dispelled once management's corroborating testimony is also considered. As the majority acknowledges, Goodloe in fact observed the employees' protected conduct on May 14. More specifically, Bonner testified that Goodloe informed her that "we have some union people on our parking lot," one of two reports that prompted Bonner to interrupt her lunch break, return to the facility, and unlawfully order Smith Sr. and Whitley to leave the Yazaki parking lot on May 14. Bonner's testimony bolsters Smith Sr.'s assertions that he was watched by an individual sitting in a vehicle in the lot and talking on a mobile phone while he and Whitley were engaged in protected activity. And employee Nannette French's testimony further fills the interstices by placing Goodloe in a vehicle in the parking lot at the relevant time. Considering this testimony together, Member Pearce finds that the logical inference is that Goodloe was the individual whom Smith Sr. described scrutinizing him from a parked vehicle. Member Pearce would accordingly reverse the judge and find that Goodloe unlawfully surveilled employees' protected conduct.

[16] As stated above, we have adopted the judge's findings that neither Manager Phil Smith's threat of consequences for Smith Sr.'s conduct nor Smith Sr.'s subsequent final warning for the same incident violated the Act.

sent and did most of the talking. When Smith Sr. requested union representation, Wright terminated the meeting and handed him a questionnaire to fill out. Wright also told Smith Sr. that he had no union representation and "no rights up here."

The judge found that Wright's statement violated the Act. He reasoned that although the Respondent lawfully terminated the interview and thus did not violate Smith Sr.'s rights under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), Wright's statement indicated to Smith Sr. that he had no such rights at all, which was untrue and tended to undermine the status of the Union as exclusive bargaining representative. In so finding, the judge noted that although the Board's re-certification of the Union on November 17, 2014, postdated the September 5 events at issue here, this did not matter because the Union's "status as exclusive bargaining representative flows from its majority support," which it enjoyed at the time of Wright's statement regardless of whether the Union's initial May 24 certification was valid.

As explained below, employees' *Weingarten* rights attach when a union has won a representation election, not when the certification of representative issues. Accordingly, regardless of whether the Union was validly certified on May 24, the Respondent violated Section 8(a)(1) when, on September 5, a date subsequent to the Union's challenged election win (July 27, 2011), Wright told Smith Sr. that he had "no rights up here"—meaning, in context, no *Weingarten* rights. See *Anchortank, Inc. v. NLRB*, 618 F.2d 1153 (5th Cir. 1980).

In *Anchortank*, supra, the Court of Appeals for the Fifth Circuit addressed the very issue presented here. In that case, the union had prevailed in an election on January 7, 1977. However, a determinative number of ballots had been challenged, those challenges were not resolved until November 4, 1977, and the certification of representative did not issue until November 29, 1977. In the interim, on or about March 25, 1977, the employer refused employee Herbert Charles' request to have a union representative present at an investigatory interview Charles reasonably believed might result in discipline. The Fifth Circuit upheld the Board's finding that this refusal violated Section 8(a)(1), although on narrower grounds than those on which the Board had relied.[17]

The court reasoned that once a union has won a challenged election, "the employee quite properly perceives his request to be one for the concerted mutual aid and protection of his fellows, for the union then stands in for all the unit employees." *Anchortank*, 618 F.2d at 1162. Accordingly, the court held that if, following a contested union victory, an employee requests union representation at an investigatory interview he reasonably believes will result in discipline, the employer acts at its peril in denying that request, just as an employer acts at its peril when making unilateral changes to conditions of work following a contested union win. Id. at 1164–1165. In both situations, if the union ultimately is certified, "the employer [will have] lost its gamble in denying union representation" and its denial will violate Section 8(a)(1). Id. at 1164. Applying these principles, the court found that because the union had already won the election when the employee requested representation at an investigatory interview, and because the union was later certified, Anchortank violated Section 8(a)(1) by denying that request.

We adopt the Fifth Circuit's analysis. Thus, we hold that when a union has prevailed in a representation election but the results of the election are challenged, if the union is subsequently certified as the unit employees' bargaining representative, the employees' *Weingarten* rights will have attached as of the time of the election, not of the certification. In other words, if an employer refuses to honor a valid *Weingarten* request following a challenged union election win, it does so at the risk that it will be found to have violated Section 8(a)(1) if the union ultimately prevails and is certified.[18] That same analysis controls the situation presented here, in which the Respondent complied with the requirements of *Weingarten* by terminating the interview when Smith Sr. requested a union representative, but also told Smith Sr. that he had no *Weingarten* rights. Thus, in making this

[17] In finding that the employer had violated Sec. 8(a)(1) by refusing Charles' request prior to the union's certification, the Board reasoned that the right to assistance at an investigatory interview applies "whether or not the employees are represented by a union" and regardless of "the status of the requested representative, whether it be that of Union not yet certified or simply that of fellow employee." *Anchortank, Inc.*, 239 NLRB 430, 431 (1978). Although Members Pearce and McFerran express no views as to the merits of this rationale, they recognize that in *IBM Corp.*, 341 NLRB 1288 (2004), the Board held that "the *Weingarten* right does not extend to a workplace where . . . the employees are not represented by a union." Id. at 1288. Chairman Ring agrees with the holding of *IBM Corp.* and thus disagrees with the Board's rationale in *Anchortank*. Although for somewhat different reasons, we are in agreement not to rely on the rationale of the Board's decision in *Anchortank*, supra, in holding that the *Weingarten* right attaches prior to certification when a union has won a challenged representation election. Rather, as explained below, we rely on the rationale of the Fifth Circuit's decision in *Anchortank*.

[18] This result flows from the employees' majority support for the Union and is consistent with well-established principles governing other aspects of the relationship between an employer and a union during proceedings contesting a representation election. See, e.g., *Alta Vista Regional Hospital*, above; *Mike O'Connor Chevrolet*, above (obligation to refrain from unilateral changes); *Sunstrand Heat Transfer, Inc. (Triangle Division)*, above (obligation to provide relevant requested information).

declaration, the Respondent assumed the risk that it would thereby violate Section 8(a)(1) of the Act if the Union was later certified. Because that eventuality came to pass, we find that the Respondent violated Section 8(a)(1) regardless of the validity of the May 24 certification when, on September 5, Human Resources Manager Sara Wright told Smith Sr. that he had no *Weingarten* rights.

3. Discharge of Stacey Williams

We adopt the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) on June 25 when it discharged employee Stacey Williams because he refused to follow certain directions during the course of his protected concerted request for a union representative.[19] The essential facts are undisputed. On June 20, Managers Maxey and Wright called Williams into a conference room to issue him a disciplinary warning. Williams requested a union representative, Wright denied his request, and Williams left the conference room. A few minutes later, Maxey and Wright approached Williams at his workstation and at least twice directed him to return to the conference room. Each time, Williams—who was neither loud nor disruptive—requested union representation, which the managers denied. Wright then directed Williams to clock out. When Williams did not immediately comply with Wright's directive, Maxey unplugged Williams' computer. Maxey and Wright then escorted Williams from the building. Again, Williams did not make any disturbance. On June 25, the Respondent discharged Williams for "[u]nprofessional, inappropriate conduct/insubordination," in a letter informing Williams that, when Maxey and Wright "tried to administer a write-up . . . [y]ou left the office, went to the warehouse floor and refused to return."[20]

We agree with the judge, for the reasons he states, that Williams' repeated requests for a union representative were protected union and concerted activity.[21] Because Williams' alleged insubordination occurred in the course of this protected conduct, the judge correctly analyzed whether the asserted misconduct was sufficiently egregious to forfeit the protection of the Act under the test articulated in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).[22] Contrary to our dissenting colleague, the Respondent's motivation in discharging Williams is not at issue—everyone agrees that it discharged him because he refused at least twice to return to the conference room when instructed to do so. That the Respondent labeled this conduct "insubordination" does not bring its motive into question.[23] Rather, for the reasons discussed by the judge, we agree that Williams' refusals to return to the conference room were inextricably intertwined with his protected request for union representation and did not come close to costing him the protection of the Act.[24] Accordingly, his discharge violated the Act.

4. Discharge of Shawn Wade

For the reasons discussed below, we find, contrary to the judge, that the Respondent violated Section 8(a)(3) and (1) by discharging Shawn Wade. On May 14, following the resolution of challenged ballots cast in the 2011 election, the Regional Director issued a revised tally of ballots showing that the Union had won the election.[25] Wade heard about the Union's victory. That day, he met with another employee, Anita Wells, in the park-

[19] Chairman Ring does not join this section of the decision. For the reasons given in his partial dissent, he would reverse the judge and find that the Respondent lawfully discharged Williams.

[20] The letter also asserted that Williams had refused an instruction to go home, but the judge concluded that no credible evidence supported this claim.

[21] We agree with the judge's implicit finding that Williams requested union representation for an investigatory meeting that he reasonably believed might result in discipline. The fact that the Respondent was not obliged to agree to Williams' requests because the meeting was for the purpose of imposing a previously determined discipline does not undermine the protected nature of his requests. Thus, just as a reasonable, but mistaken, belief in rights under a collective-bargaining agreement does not eliminate the protected nature of an employee claim (see, e.g., *Omni Commercial Lighting*, 364 NLRB No. 54, slip op. at 3 (2016)), neither does the fact that Williams was ultimately not entitled to his requested representative.

Further, Williams' requests for union representation were concerted as well as protected union activity. As the Fifth Circuit stated in *Anchortank*, once a union has won a challenged election, "the employee quite properly perceives his request [for representation] to be one for the concerted mutual aid and protection of his fellows, for the union then stands in for all the unit employees." 618 F.2d at 1162. That concerted purpose was particularly manifest here. Williams' request was on the heels of the Union's certification, and the Respondent's continued refusal to recognize it. As the judge found, Williams' request was "in furtherance of the Union's effort to assert its continuing presence in the workplace, an effort the Union initiated by giving employees the 'Weingarten cards'" so that the Respondent "would recognize and deal with the Union as the employees' exclusive representative."

[22] We adopt the judge's application of the *Atlantic Steel* factors without relying on his citation of *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), as the genesis of that test.

[23] We accordingly find it unnecessary to pass on the judge's alternative analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[24] We reject the Respondent's claim that Williams was lawfully discharged for insubordination. His requests for representation, even if he was not entitled to it, remain protected unless his conduct is sufficiently egregious to forfeit the Act's protection. We agree with the judge that Williams' conduct did not cost him that protection. See, e.g., *Omni Commercial Lighting*, supra, slip op. at 18 (rejecting employer's claims that it lawfully terminated employee for insubordinate, aggressive behavior, where employee was pursuing good faith (albeit mistaken) contract claim, and his conduct did not cause him to lose the Act's protection).

[25] See *Ozburn-Hessey Logistics*, 361 NLRB at 921.

ing lot of one of the Respondent's warehouses to sign a union card. While he was doing so, Vice President Randall Coleman drove by. The judge credited Wade's testimony that Coleman saw him. Although the judge found it unlikely that Coleman, a senior executive, would recognize Wade, Coleman testified that he knew who Wells was.

The next day, May 15, Wade was running late to work. He parked in a visitor parking spot, entered the warehouse, clocked in, and then left the warehouse to move his car to the employee lot. Manager Ken Ball observed him leaving the building after his shift started and reentering the building 3 minutes later, and Ball reported the incident to Wade's manager. The Respondent discharged Wade that same day, purportedly for stealing time.

Applying *Wright Line*, 251 NLRB at 1089, the judge found that although Wade had engaged in union activity and the Respondent bore antiunion animus, the General Counsel did not meet his burden of showing that the Respondent knew of Wade's union activity. The judge found that there was no reason to believe that Coleman knew who Wade was or that Coleman knew what Wade was doing in the parking lot. The judge rejected the General Counsel's argument that knowledge should be inferred from other relevant circumstances, including the timing of Wade's discharge, contemporaneous unfair labor practices, and the disparate treatment of similarly situated employees. Contrary to the judge, we find the General Counsel's argument persuasive. Accordingly, we find that the General Counsel met his initial burden under *Wright Line* to show that union activity was a motivating factor in the Respondent's decision to discharge Wade.

Under the *Wright Line* test, the elements required to meet the General Counsel's initial burden of proof "are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer." *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enfd. in relevant part sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015).[26] Regarding the second of these elements, the General Counsel may establish that an employer knows of an employee's union activity through circumstantial evidence, including "(1) the timing of the allegedly discriminatory action; (2) the respondent's general knowledge of union activities; (3) animus; and (4) disparate treatment." *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996).

Here, we find that circumstantial evidence supports an inference, which we draw, that the Respondent knew of Wade's union activity. Immediately after the revised tally of ballots demonstrated the Union's victory, openly prounion employees, including Wells, solicited signatures on authorization cards in the Respondent's parking lots. The Respondent witnessed some of this activity and was undoubtedly aware of it. Both managers and employees used the parking lot in which Wade signed the card, and the judge concluded that at least one manager saw Wade with Wells in that lot. The Respondent then discharged Wade the very next day. Thus, the Respondent discharged Wade immediately after he engaged in protected union activity, the Respondent knew that union activity was taking place in its parking lots when Wade signed his card, and the Respondent bore animus against its employees' union activity—as shown by unfair labor practices, including Manager Bonner's unlawful May 14 order to two employees to leave the premises. Moreover, as explained below, the Respondent treated Wade differently from other employees who had briefly left the building during their shift. This evidence of disparate treatment accomplishes three purposes. First, it further supports an inference that the Respondent knew that Wade supported the Union. *Montgomery Ward*, supra. Second, the disparate treatment further supports a finding of animus,[27] and third, as explained below, it defeats the Respondent's attempt to show that it would have discharged Wade for stealing time even in the absence of his union activity.

The General Counsel introduced two exhibits showing that the Respondent had not discharged employees for first offenses similar to Wade's. In one instance, employee Brandon Smith left the building to move his car, Manager Bonner observed him doing so, and Bonner told Smith that he could not do so. Smith was not discharged. On a subsequent occasion, *before* Smith left the building, Bonner told Smith not to do so, and Smith ignored her and left the building. Contrary to the judge's analysis, this second incident, not the first, led to Smith's discharge, and on that occasion Smith not only left the building to move his car, he also disobeyed a direct order

[26] Once the General Counsel has met this burden, the employer can "avoid being adjudicated a violator by showing what [its] actions would have been regardless of [its] forbidden motivation." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400–401 (1983). Thus, contrary to the judge's statement of the *Wright Line* test, the employer's defense burden is to show that it would have taken the same action even if the employee had not engaged in protected activity—not to show, as the judge suggests, the lack of a connection or nexus between the employee's protected activity and the challenged adverse employment action. See *Allstate Power Vac., Inc.*, 357 NLRB 344, 346–347 (2011).

[27] See, e.g., *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011) ("Animus may be inferred from circumstantial evidence, including . . . disparate treatment.").

not to leave the building and thus was insubordinate. In another example, unmentioned by the judge, employee Shakila Banis clocked in 1 minute before her shift started, left the building, and returned 8 minutes later, and the Respondent issued Banis an attendance point. In other words, the Respondent viewed Banis's actions as akin to arriving late, not as stealing time. Although Banis was terminated, she was terminated because she had accumulated 16 attendance points. Wade, on the other hand, was discharged for a first instance of briefly leaving the building to move his car.

In addition to those two instances, employees almost uniformly testified that before Wade's discharge, employees regularly left the building without consequence, sometimes in full view of supervisors. Employee Dwayne Nelson testified that "we all" clocked in and then left to move cars, and Nelson added that Supervisor Darnell Flowers saw him do so on at least one occasion. Nelson was not disciplined. Similarly, employee Teresa Pressman testified that she would leave the building to get a box cutter or roll up her windows, and although Flowers told her to tell somebody when she did so, she was not disciplined regardless of whether she told a supervisor. This testimony, not addressed by the judge, established that as of the time of Wade's discharge, Wade's actions were common and were deemed by the Respondent to warrant at most a coaching or an attendance point, not a discharge for a first offense.

To the extent that the Respondent has terminated employees for stealing time, it has done so only when employees have been absent for significant periods. As explained above, the evidence shows that before Wade's termination, the Respondent did not treat briefly leaving the building for a few minutes as stealing time, but instead as, at most, an attendance infraction. In these circumstances, having previously found that the General Counsel sustained his initial burden under *Wright Line*, we have no difficulty finding that the Respondent did not meet its *Wright Line* defense burden of showing that it would have discharged Wade absent his union activity. We therefore find that Wade's discharge violated Section 8(a)(3).

5. Discharge of Nannette French

We also find, contrary to the judge, that the Respondent's discharge of Nannette French violated Section 8(a)(3).[28] On May 14, French, who worked at the Respondent's Yazaki warehouse,[29] handed out union authorization cards to other employees and solicited their signatures. She did so openly in the Yazaki parking lot. Although there is no credited evidence that any supervisor saw her doing so, Bonner's testimony, described above, establishes that Goodloe saw "two union people" distributing cards in the Yazaki lot on that day. Moreover, it is undisputed that Bonner knew of handbilling on May 14 and ordered two other employees who were soliciting cards to leave the Yazaki lot.

On May 17, French returned to the facility 1 minute late from her lunchbreak. For this infraction, the Respondent assessed her an attendance point. Under the Respondent's written attendance policy, employees are assessed one point for being late to a shift, including being late returning from their lunchbreaks. The attendance policy states that employees will receive particular forms of discipline when they accumulate specified numbers of points, culminating in discharge when an employee exceeds 12 points. French's attendance point for being late on May 17 was her 13th, and the Respondent discharged her for violating its attendance policy.

The judge dismissed the allegation that French's discharge violated Section 8(a)(3), finding the evidence insufficient to support an inference that the Respondent knew of French's union activity. For much the same reasons discussed above in connection with Wade's discharge, we reverse. Here, the circumstantial evidence even more strongly supports an inference that the Respondent knew of French's union activity. French openly distributed union authorization cards in the Yazaki parking lot on a day when managers saw similar activity in that very same parking lot. She was discharged shortly afterward. Moreover, as discussed below, the Respondent has not consistently discharged employees who reach 13 attendance points. Based on the timing of French's discharge, the Respondent's general knowledge of union activity, the Respondent's antiunion animus, and the disparate treatment of French, we infer that the Respondent knew of her open union activity on May 14. See *Montgomery Ward & Co.*, above; see also *Coastal Sunbelt Produce*, 362 NLRB No. 126, slip op. at 2 (2015) (citing cases) ("[T]he Board has long held, with court approval, that knowledge of union activity may be established by circumstantial evidence."). Accordingly, having also established French's union activity and the Respondent's animus against such activity, the General Counsel met his initial burden under *Wright Line*.

Because the Respondent treated French disparately from other employees who reached 13 attendance points,

[28] Chairman Ring does not join this section of the decision. For the reasons stated in his partial dissent, he would affirm the judge's finding that French was lawfully discharged.

[29] In addition to the Respondent's own Memphis warehouses, the Respondent contracted to provide employees to work at a Memphis warehouse owned by Yazaki, an automotive parts supplier. See https://en.wikipedia.org/wiki/Yazaki (last visited June 14, 2018).

the Respondent did not satisfy its *Wright Line* defense burden of showing it would have discharged French even in the absence of her union activity. Despite its written policy, the Respondent generally did not discharge employees for reaching 13 attendance points. To the contrary, it has frequently allowed employees to accumulate far more than 13 points. See *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180, slip op. at 23 (listing seven examples of employees who were not discharged until they reached 23 or more attendance points). For instance, in October 2011, employee M. Davis was discharged when he reached 27 attendance points—more than twice as many as French. Id.[30]

We also reject the Respondent's argument that French's discharge was a nondiscriminatory consequence of stricter enforcement of attendance policies, starting in 2011 when Shannon Miles took charge of human resources. The Respondent introduced no documentary evidence or credited testimony to support this claim. Further, even if the Respondent had established that it had implemented a stricter attendance policy—which it has not—we would be reluctant to accept as an affirmative defense what amounts to an admission of conduct that violates the Act. Thus, any Respondent action to unilaterally enforce its attendance policy more strictly after the July 27, 2011 representation election would have constituted an unlawful unilateral change. See, e.g., *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1017 (2005) ("The Board has held that a change from lax enforcement of a policy to more stringent enforcement is a matter that must be bargained over.").

Accordingly, for the reasons stated above, we find that the General Counsel has met his burden of proving that French's union activity was a motivating factor in her discharge, and the Respondent did not meet its burden of proving that it would have discharged French even absent her union activity. We therefore find that French's discharge violated Section 8(a)(3).

6. Discharge of Smith Sr.

Contrary to the judge, we find that the Respondent's discharge of Smith Sr. also violated the Act.[31] As stated above, we have adopted the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally increasing enforcement of its rule against employees leaving the warehouse after clocking in. In September, as part of this increased enforcement, Human Resources Manager Wright reviewed the Respondent's security footage and compiled a list of employees who had recently left the warehouse without clocking out. She then issued each employee on the list a questionnaire, which asked them if they had left the building after clocking in, and if so, if they had received management permission to do so. Smith Sr. was one of the employees who was shown leaving the building on the security footage, and he received a questionnaire.

In his response to the questionnaire, Smith Sr. denied leaving the building after clocking in. The Respondent discharged him, ostensibly for lying. It did not discipline any other employees who left the building. Although the Respondent routinely used questionnaires in disciplinary investigations, there is no record evidence of any other instance where it disciplined an employee for the employee's answer on a questionnaire.

The judge found that Smith Sr. had engaged in union activity, the Respondent knew of that activity, and the Respondent bore antiunion animus. Therefore the judge found that the General Counsel met his initial burden under *Wright Line*. There are no exceptions to this finding.[32] However, the judge also found that the Respondent proved that it would have discharged Smith Sr. for lying regardless of his union activity. Contrary to the judge, we find that the Respondent did not sustain its *Wright Line* defense burden.

In finding that the Respondent proved its affirmative defense, the judge observed that the Respondent has a strong interest in protecting the integrity of its investigations because actions taken on the basis of those investigations could have serious consequences for the affected employees and carry the potential for legal liability. Although we do not disagree with this general justification for a rule against lying in investigations, it carries little weight here. The Respondent had indisputable video evidence of employees leaving the building after clocking in. It had no need to rely on Smith Sr.'s answer to the questionnaire. Most tellingly, despite its asserted business justifications for disciplining employees who lie on questionnaires, the Respondent has not consistently done so: in at least one instance the Respondent concluded that an employee lied on a questionnaire but took no

[30] The record reveals only one other instance when the Respondent discharged an employee—Lauren Keele—for accumulating 13 attendance points. As discussed below, we find Keele's discharge unlawful because she accrued her final attendance point as a result of the Respondent's unlawful unilateral change in its timekeeping system.

[31] Chairman Ring does not join this section of the decision. As explained in his partial dissent, he would adopt the judge's finding that Smith Sr. was lawfully discharged.

[32] The judge mischaracterized the General Counsel's initial burden under *Wright Line* as a burden of production rather than a burden of proof. But this was harmless error, as the judge correctly identified the elements required to meet the General Counsel's burden of proof—protected activity, knowledge of protected activity, and animus against protected activity—and he found that the General Counsel established each of these elements. Effectively, therefore, the judge found that the General Counsel met his burden of proof under *Wright Line*.

action. As the judge found, employee Jennifer Smith touched employee Luz Balderrama in the bathroom on August 30, less than a month before Smith Sr.'s discharge, and the Respondent concluded that she had done so. But when Jennifer Smith submitted a questionnaire that stated she had not touched Balderrama, the Respondent did not discipline her for this untruthful answer.[33]

Given the Respondent's widespread use of questionnaires, its failure to identify any other instance in which it has disciplined or discharged an employee for an untruthful answer, and evidence of at least one instance where the Respondent knew an employee had lied on a questionnaire and did not impose discipline, we find the Respondent has not shown that it typically disciplines or discharges employees for lying on an investigative questionnaire. Smith Sr. was the Union's primary organizer, and the Respondent had already discharged him unlawfully once before. See *Ozburn-Hessey Logistics*, 357 NLRB 1632, 1633, 1643–1644 (2011). It takes no great inferential leap to find that the Respondent used his lie on the questionnaire as a pretext to get rid of Smith Sr. for his union activity. We therefore find that the Respondent did not prove its affirmative defense that it would have discharged Smith Sr. regardless of his union activity, and Smith Sr.'s discharge therefore violated Section 8(a)(3).[34]

7. Unilateral increase in contributions to employees' 401(k) accounts

The judge found that the Respondent unilaterally increased its contributions to employees' 401(k) retirement accounts and that such contributions constitute a mandatory subject of bargaining. There are no exceptions to these findings. However, on Section 10(b) grounds, the judge dismissed the allegation that this unilateral change violated Section 8(a)(5). We reverse.

The judge found that the charge alleging this unilateral change, filed on October 26, 2012, was untimely under Section 10(b) of the Act because the unilateral change occurred in January 2012, more than 6 months before the charge was filed. However, the 6-month Section 10(b) limitations period does not begin to run until the charging party has "clear and unequivocal notice" of a violation of the Act. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), enfd. sub nom. *East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007). The burden of proof rests on the party asserting a Section 10(b) defense. See, e.g., *Chinese American Planning Council*, 307 NLRB 410, 410 (1992), review denied mem. 990 F.2d 624 (2d Cir. 1993). Therefore, to establish that the 401(k) unilateral change allegation must be dismissed as untimely, the Respondent had to show that the Union failed to file a relevant charge within 6 months of being put on clear and unequivocal notice of the Respondent's unilateral increase in 401(k) contributions.

The Respondent did not make that showing. At the hearing, no witness testified that he or she notified the Union of the change. Indeed, there is no record evidence establishing when the Union was put on notice of the change. Accordingly, the Respondent has not carried its burden of showing that the allegation is time-barred, and the unilateral increase in contributions to unit members' 401(k) retirement accounts violated Section 8(a)(5) of the Act.

8. Unilateral implementation of the Kronos timekeeping system

We also reverse the judge to find that unilateral changes in the Respondent's timekeeping and leave-request systems violated the Act.[35] In late April, the Respondent replaced its Unitime timekeeping equipment with a new system called Kronos. Under the Unitime system, employees would clock in and out on a clock equipped with physical buttons for each recordable event (signing in and out for shifts and lunch). In addition, the Unitime system did not handle time-off requests. To request paid time off, employees submitted a leave request on paper. The paper request was submitted directly to a manager, who would approve or disapprove the request. The Kronos system was more sophisticated than the Unitime system. It came with a 50-page instruction manual. It featured a touchscreen, not physical buttons. Moreover,

[33] We are puzzled by our dissenting colleague's argument that the Respondent's disparate treatment of Jennifer Smith does not undermine its proffered reason for discharging Smith Sr. because the Respondent merely *believed* Jennifer Smith lied, while Smith Sr. *indisputably* lied. If the Respondent had a nondiscriminatory practice of disciplining employees for lying on questionnaires, surely it would have disciplined employees the same regardless of how it had determined untruthfulness. That it did not do so supports our conclusion that it would not have discharged Smith Sr. absent its desire to punish him for his protected conduct.

[34] Indeed, given the General Counsel's strong showing of unlawful motivation against Smith Sr., the Respondent's rebuttal burden was substantial. *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1207 (2014). It clearly was not met here.

As noted above, we do not rely on the judge's suggestion that, after the General Counsel has made his initial showing under *Wright Line*, a respondent can meet its defense burden by showing a lack of connection or nexus between the employee's protected concerted or union activity and the challenged adverse employment action.

The judge did not address whether Smith Sr.'s discharge also violated Sec. 8(a)(4) as alleged in the complaint. We find it unnecessary to pass on this allegation as it would not materially affect the remedy.

[35] Chairman Ring does not join this section of the decision. For the reasons stated in his partial dissent, he would find that these changes were made lawfully.

employees were required to use the Kronos system for several purposes, including requesting time off. Employees were instructed to submit leave requests through the Kronos system, and they would find out if their leave was approved or denied by checking Kronos later. It is undisputed that the Respondent did not notify the Union before switching to the Kronos system.

The judge found that the implementation of the Kronos system did not violate Section 8(a)(5) of the Act on the basis that it did not constitute a material, substantial, and significant change in employees' terms and conditions of employment. We disagree and reverse.

The Kronos system was significantly more complicated than the Unitime system. As stated, it came with a 50-page instruction manual.[36] Its greater complexity was exemplified by the experience of employee Lauren Keele. When Keele attempted to timely log in from her lunchbreak, she pressed the wrong "button" on the Kronos clock's touchscreen, prompting another screen to appear. Keele needed assistance to return to the prior screen. By the time she was able to successfully log back in, she was 1 minute late and subsequently fired purportedly for accrued attendance points. This would not have occurred with the Unitime clock.

In addition, the Respondent used the Unitime system solely for timekeeping, but it uses the Kronos system both for timekeeping and the submission, approval, and tracking of leave requests. Significantly, employees who submitted leave requests under the new system no longer immediately learned whether their requests were approved. Instead, they had to wait for a manager to enter the approval or disapproval in the Kronos system. The Board has found less impactful changes than this to be material, substantial, and significant. See, e.g., *Verizon New York, Inc.*, 339 NLRB 30 (2003) (finding Sec. 8(a)(5) violation for unilateral termination of twice-yearly practice of permitting employees to donate blood during worktime), enfd. 360 F.3d 206 (D.C. Cir. 2004); *Rangaire Co.*, 309 NLRB 1043 (1992) (finding 8(a)(5) violation for unilateral withdrawal of extra 15 minutes for lunchbreak once a year, on Thanksgiving), enfd. mem. 9 F.3d 104 (5th Cir. 1993). We find that the change from the Unitime clock to the Kronos system constituted a material, substantial and significant change to employees' working conditions. Because the Respondent implemented this change unilaterally, it violated Section 8(a)(5).

[36] Contrary to our dissenting colleague, this case is therefore not similar to *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976), where an employer changed from handwritten timecards to a time clock. Timecards and time clocks accomplish the same task of recording an employee's start and stop times, and they place approximately the same burdens on employees. Here, the evidence shows that the Kronos system was significantly more complex and burdensome than the Unitime clock it replaced.

9. Changing the start times of Anita Wells and Chris Waller

Employees Anita Wells and Chris Waller worked in the Receiving Department of the Respondent's Hewlett-Packard account. Until about April, Wells and Waller alternated starting work 1 hour before the Receiving Department's general start time (i.e., 7 a.m. compared with the 8a.m. start for other department employees). When Manager Stacey Deal took over the department, she ended this arrangement and required both employees to start work at the same time as the rest of the department. It is undisputed that the Respondent implemented this change unilaterally. As with the implementation of the Kronos timekeeping system, the only dispute here concerns whether the change constituted a material, substantial and significant change to Wells' and Waller's terms and conditions of employment.

Contrary to the judge, we find that the change in the employees' start times was a material, substantial and significant change. The Board has found shift changes of 15 minutes or less to be material, substantial and significant. See *Pepsi-Cola Bottling Company of Fayetteville, Inc.*, 330 NLRB 900, 902 (2000) (finding that requiring employees to start their shifts 15 minutes earlier each day constitutes a material, substantial and significant change), enfd. in relevant part 24 Fed. Appx. 104 (4th Cir. 2001); *Hedison Manufacturing Co.*, 260 NLRB 590 (1982) (finding that requiring employees to report to their workstations 5 minutes earlier than the previous reporting time is a material, substantial and significant change). We therefore find that the change to Wells' and Waller's shifts was material, substantial and significant, and by implementing this change unilaterally the Respondent violated Section 8(a)(5).

10. Motion to amend the complaint

Before the hearing closed, the General Counsel moved to amend the complaint to add two allegations based on the testimony of Manager Ken Ball. Specifically, the General Counsel sought to add allegations that the Respondent violated Section 8(a)(1) when Ball, on two occasions, removed union literature from a break room, and Section 8(a)(5) when Ball allegedly dealt directly with employees in the Hewlett-Packard (HP) account over potential changes to the shifts employees in that account would work. The judge denied the General Counsel's motions. He found that the literature-removal allegation was cumulative and also that allowing the motion would unfairly prejudice the Respondent, and he found that the direct-dealing allegation was not fully litigated. For the

reasons set forth below, we grant the General Counsel's motion to amend the complaint to add the literature-removal allegation, but we adopt the judge's denial of the motion to add the direct-dealing allegation.[37]

In determining whether to allow an amendment to the complaint where the motion is made during or after the unfair labor practice hearing, the Board considers a variety of factors, "including the identity of the party who first introduced evidence relating to the unfair labor practice issue, whether the issue was fully litigated, and whether the [r]espondent demonstrated that the amendment is prejudicial." *Pincus Elevator and Electric Co.*, 308 NLRB 684, 684 (1992), enfd. mem. 998 F.2d 1004 (3d Cir. 1993). The Board has also considered "surprise or lack of notice" and "whether the General Counsel offered a valid excuse." *CAB Associates*, 340 NLRB 1391, 1397 (2003). In *CAB Associates*, the General Counsel waited until after the hearing closed to move to add an allegation, and the Board adopted the judge's recommendation to allow the amendment because the allegation was based on evidence adduced from the Respondent's witnesses at trial. Id.

Ball testified that on two occasions, he noticed union literature in the HP account's break room. Believing that Human Resources should see the literature, he removed it and sent it to Human Resources. Ball also testified that he removed the literature between employee breaks, and no employee saw him remove it. Ball further testified that before the Respondent split the HP account into two teams, each of which worked 11-hour shifts 3 days per week, he met with employees in the account and solicited opinions from employees on possible shift changes. Ball could not identify any particular suggested change that he incorporated into the final schedule, but he testified that the employees' overriding concern was to avoid a reduction in hours, and he kept that consideration in mind in making the changes.[38]

Here, as to both allegations, several of the applicable factors mentioned above favor allowing the amendment to the complaint. Ball was called as a witness by the Respondent, and the General Counsel promptly moved to amend the complaint after Ball testified. Although the union literature that Ball admitted removing had been provided to the General Counsel in response to a subpoena, the General Counsel had no reason to know that Ball removed all copies of the literature from a break room until Ball testified. Similarly, before Ball testified, the General Counsel had no documentary or testimonial evidence regarding the alleged direct dealing. Therefore, three of the five factors recited above are met for each allegation the General Counsel seeks to add by way of amendment: the Respondent introduced the relevant testimony, the General Counsel offered a valid excuse for not having alleged the violation earlier, and there was no surprise or lack of notice because the General Counsel moved to amend the complaint at the earliest possible opportunity, promptly after Ball testified.

In addition, the literature-removal allegation was fully litigated at the hearing, and allowing the amendment to the complaint to add that allegation would not unduly prejudice the Respondent. It is undisputed that Ball removed union literature from the break room and that he did so because he thought Human Resources should see it. It is also undisputed that Ball removed the literature *between* breaks, and thus before the last break of the day, which may have prevented some employees from seeing it. Moreover, Ball testified that nobody saw him remove the literature, so by Ball's own admission no witness could have been called to dispute Ball's testimony. The Respondent has not identified any evidence it was prevented from introducing due to the late amendment of the complaint. We therefore find that the literature-removal allegation was fully litigated, and the Respondent is not prejudiced by allowing the amendment.

On the merits of the allegation, we further find that the Respondent violated Section 8(a)(1) when Ball removed the union literature from the break room. Ball's testimony establishes that he was not enforcing a nondiscriminatory housekeeping rule in a nondiscriminatory manner. See, e.g., *North American Refractories Co.*, 331 NLRB 1640, 1642–1643 (2000) (holding that an employer may lawfully maintain and enforce housekeeping rules that result in the confiscation from nonworking areas of pro-union literature left behind following break periods). Rather, the evidence shows that Ball specifically targeted union literature for removal. By doing so, the Respondent violated Section 8(a)(1). See, e.g., *Venture Industries*, 330 NLRB 1133, 1134, 1137–1138 (2000); *Vemco, Inc.*, 304 NLRB 911, 927 (1991).

On the other hand, we find that the direct-dealing allegation was not fully litigated, and the Respondent would be prejudiced were the amendment to be allowed. When Ball testified about his meetings with employees on the HP account, the Respondent was not on notice that his testimony might be used to support a direct-dealing allegation. Moreover, multiple employees were present at these meetings and might have had different recollec-

[37] As discussed below, Member Pearce would grant the General Counsel's motion to add the direct-dealing allegation.

[38] In denying the General Counsel's motion to amend, the judge did not specifically credit or discredit Ball's testimony summarized above. However, the judge did credit Ball's testimony in another instance. We see no reason not to credit Ball's uncontroverted testimony in relevant part here as well.

tions of what Ball said. Ball testified late in the last week of the hearing, and the Respondent did not have an opportunity to subpoena the testimony of employees present at those meetings. Contrary to the suggestion of our dissenting colleague, had the Respondent known that this testimony would be the basis for a new direct-dealing allegation, it might have presented additional rebuttal testimony or other evidence specifically addressing the components of that cause of action. Not having adequate notice of the General Counsel's intent to present this as a separate allegation, however, the Respondent here could not present tailored evidence in support of its position. Moreover, the Respondent's lack of opportunity in this regard is significant given the closeness of the direct-dealing issue on the merits. To establish a direct-dealing violation, the General Counsel must show that the Respondent communicated directly with union-represented employees for the purpose of establishing or changing wages, hours, or other terms and conditions of employment to the exclusion of the Union. *Southern California Gas Co.*, 316 NLRB 979, 982 (1995). According to Ball's testimony, Ball met with employees on three occasions "[t]o get them involved" in the decision regarding the HP account schedules, and he admitted to soliciting employees' suggestions during these meetings. But whether meeting with employees "to get them involved" establishes that the purpose of the meetings was to change employment terms presents a close question, and Ball also testified that there were no particular proposals from employees that he incorporated into the final changes. In these circumstances, we affirm the judge's denial of the motion to amend the complaint to add the direct-dealing allegation.[39]

[39] Contrary to his colleagues, Member Pearce would grant the General Counsel's motion to amend the complaint and find that the Respondent unlawfully bypassed the union and directly approached employees on the HP account about its proposed change to their scheduled work hours. See *Permanente Medical Group* , 332 NLRB 1143, 1144 (2000) (a respondent engages in unlawful direct dealing by communicating directly with union-represented employees to the exclusion of the union for the purpose of establishing or changing wages, hours, or terms and conditions of employment). First, as the majority acknowledges, the Respondent introduced the relevant evidence, and the General Counsel moved to amend the complaint at the first opportunity. See *Pincus Elevator and Electric Co.*, above. However, contrary to the majority, the substantive issue is not close. Ball admitted to soliciting employees' opinions about the proposed schedule change: he testified that "[w]e . . . asked several employees about it with the guys, see what they thought about it. . . . And so that's kind of where it all generated from." The Respondent's admission that it bypassed the Union to solicit employee opinions before it changed their schedules (unlawfully, as we have unanimously found above) itself establishes the direct-dealing violation regardless how employees understood or responded to the solicitation and whether or not the Respondent acted upon their opinions. This is because it is the solicitation itself that erodes the Union's position as exclusive representative. See, e.g., *Allied-Signal, Inc.*, 307 NLRB 752, 753–754 (1992) ("Direct dealing need not take the form of actual bargaining. . . . Going behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions [such as a workplace smoking policy] plainly erodes the position of the designated representative."). Because the Respondent admitted the necessary factual basis of the violation alleged, the issue has been fully litigated. See, e.g., *Conagra Foods, Inc.*, 361 NLRB 944, 946 fn. 10, 960 (2014) (judge properly granted General Counsel's motion to amend the complaint at the close of the hearing where "no additional evidence could have bearing on the merits of the additional allegation"), enfd. in relevant part 813 F.3d 1079, 1092 (8th Cir. 2016). In any case, the General Counsel moved to amend the complaint at the beginning of the eighth day of the 10-day hearing. The judge deferred ruling on the motion (which he found "much tougher" than the literature-removal allegation) but requested that the parties address it in posthearing briefs. Thus, the Respondent had ample time to respond, but it proffered no evidence to counteract or mitigate its admission. Under these circumstances, the timing of the General Counsel's motion clearly did not prejudice the Respondent. Member Pearce would accordingly find that Ball's direct dealing with employees in the HP account violated Sec. 8(a)(5) and (1).

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We will order the Respondent to make its employees whole for losses resulting from its unlawful unilateral changes in employees' terms and conditions of employment. With the exception of employee Lauren Keele, backpay for losses resulting from the unlawful unilateral changes shall be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We will also order the Respondent to offer reinstatement to Jerry Smith Sr., Nannette French, Shawn Wade, Stacey Williams, and Lauren Keele and to make them whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges. Backpay for these five individuals shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in rel. part 859 F.3d 23 (D.C. Cir. 2017), we shall order the Respondent to compensate Wade, French, Williams, Smith Sr., and Keele for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, com-

pounded daily as prescribed in *Kentucky River Medical Center*, supra. We will also modify the judge's Social-Security-reporting remedy to conform to our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

We shall order the Respondent, on request by the Union, to rescind each of the unilateral changes to unit employees' terms and conditions of employment. We shall further order the Respondent to provide the Union with the information it initially requested on June 3, 2013, without further delay. We need not pass on the judge's recommended remedy pursuant to *Mar-Jac Poultry*, 136 NLRB 785, 786 (1962), because the Board issued an affirmative bargaining order in the Section 8(a)(5) test-of-certification case on June 15, 2015. See *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 118 (2015). There, the Board stated that "[t]o ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union." Id. (citing *Mar-Jac Poultry*, supra). The D.C. Circuit's decision enforcing that order issued August 19, 2016. See *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210 (D.C. Cir. 2016).

The judge ordered notice reading by a Board agent or a responsible management official in the presence of a Board agent, and the judge further ordered that an agent of the Union may attend the notice reading and make an audio-visual recording of it. We adopt these enhanced remedies. Moreover, because of the Respondent's record of repeatedly violating the Act, we will order further remedies as set forth below in order to ensure the effectiveness of our Order.

With this decision, the Board has now issued six decisions finding that the Respondent has engaged in serious and widespread violations of the Act since 2009, when the Union's initial organizing drive began. In the instant decision, we have found, among other violations, that the Respondent unlawfully discharged Smith Sr., the primary union organizer, for a second time, after a court ordered his reinstatement. Also, with today's decision, the Board has found that Director of Operations Phil Smith has unlawfully removed union literature from employee break rooms three times, including one instance in which he removed a copy of a judge's order that commanded the Respondent to cease and desist from removing union literature from break rooms. Moreover, our finding that Manager Ken Ball also removed union literature from a break room indicates that the Respondent either has not instructed its managers to comply with our orders or has not sufficiently impressed upon them the importance of compliance.

In prior decisions, we have found that the Respondent unlawfully discharged four employees (two of them twice), unlawfully disciplined employees for supporting the Union, coercively interrogated employees about their union support and that of other employees, denied employees overtime work because of their union activity, threatened employees for engaging in activity protected by Section 7, threatened employees with loss of benefits if they selected the Union as their representative, confiscated union literature, threatened employees with job loss if they participated in a strike, threatened employees that selecting a union representative would be futile, ordered off-duty employees engaged in the distribution of union literature to leave its parking lots, engaged in unlawful surveillance of employees' union activities, created the impression that employees' union activities were under surveillance, told employees who support the Union to resign, and refused to bargain with the certified representative of its employees. Here, we have found numerous additional instances in which the Respondent has violated the Act, including by multiple employee discharges, recurrent 8(a)(1) coercive conduct, and repeated actions that undermine the Union by—among other things—unlawfully unilaterally changing terms and conditions of employment. By any measure, this is an extraordinary record of law breaking, and it merits an extraordinary response.

We have twice previously imposed broad cease-and-desist orders on the Respondent. See *Ozburn-Hessey Logistics, LLC*, 361 NLRB at 922; *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180, slip op. at 4–5. We do so again here, for the reasons stated in those decisions and based on the Respondent's continuing widespread violations in the instant case. Although no party urges us to adopt additional remedies, we have broad discretion to exercise our remedial authority under Section 10(c) of the Act, even when no party has taken issue with the judge's recommended remedies. See, e.g., *Teamsters Local 122*, 334 NLRB 1190, 1195 (2001), enfd. mem. No. 01–1513, 2003 WL 880990 (D.C. Cir. Feb. 14, 2003) (consent judgment); *WestPac Electric*, 321 NLRB 1322, 1322 (1996); *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996).

In order to dispel the lingering effect of the Respondent's unfair labor practices, we shall order the Respondent to post the remedial notice for an extended period of 3 years. See *HTH Corp. d/b/a Pacific Beach Hotel*, 361 NLRB 709, 714 (2014), enfd. in relevant part sub nom. *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016). We will further order the Respondent to publish the remedial

notice in two publications of broad circulation and local appeal twice a week for a period of 8 weeks.[40] The Regional Director for Region 15 will choose the publications. In this way, the notice may be seen by former employees who have been affected by the Respondent's unfair labor practices, as well as by future employees. See id. at 715.[41] In addition, the persistent repetition of the same unfair labor practices by different supervisors and managers shows that the Respondent has not sufficiently trained its managers and supervisors in their duty to abide by the Act's requirements. Consequently, we find it necessary to ensure that each of the Respondent's supervisors and managers is made aware of the Board's findings herein. To do so, we order the Respondent to give each of its supervisors and managers a copy of the remedial notice, to provide sign-in sheets for supervisors and managers at each reading of the notice, and, on request, to furnish those sign-in sheets to one or more authorized representatives of the Regional Director for Region 15. Managers and supervisors need not attend every reading of the notice, but every supervisor and manager must attend at least one reading.

ORDER

The Respondent, Ozburn-Hessey Logistics, LLC, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Confiscating union materials from employee break areas.

(b) Ordering offsite employees distributing union literature for organizational purposes in an outside, nonworking area to leave the premises.

(c) Telling employees to resign if they do not like their working conditions.

(d) Telling bargaining-unit employees that they are not represented by the Union.

(e) Discharging employees for supporting the United Steelworkers Union (the Union) or for other protected concerted activities.

(f) Refusing to bargain collectively with the Union by unilaterally changing terms and conditions of employment of its unit employees, including by the following such unilateral changes: implementing a mandatory exercise and stretching program; implementing an advance notice requirement for employees requesting time off; changing its policy to disallow employees from using paid time off to make up their hours when they are sent home early; changing the shipping department hours from 8 hours per day, 5 days per week to 11 hours per day, 3 days per week; changing the inventory department start time from 4 a.m. to 8 a.m.; increasing enforcement of its policy prohibiting employees from leaving the building after clocking in; increasing contributions to employee 401(k) plans; implementing new timekeeping and leave-request systems; and changing certain employees' start times.

(g) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the unit employees' collective-bargaining representative.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Shawn Wade, Nannette French, Stacey Williams, Jerry Smith, Sr., and Lauren Keele full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Shawn Wade, Nannette French, Stacey Williams, Jerry Smith, Sr., and Lauren Keele whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Shawn Wade, Nannette French, Stacey Williams, Jerry Smith, Sr., and Lauren Keele, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) On request by the Union, rescind the unilateral changes in terms and conditions of employment implemented in April through September 2013.

(e) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, mainte-

[40] Chairman Ring does not join in those paragraphs of the Order that require the Respondent to post the remedial notice for 3 years or to publish the notice in two publications of broad circulation and local appeal twice a week for a period of 8 weeks.

[41] For the reasons given in his partial dissent, Chairman Ring would not extend the notice-posting beyond the usual 60 days or order the Respondent to publish the remedial notice.

nance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at the Memphis, Tennessee facilities located at 5510 East Holmes Road, 5540 East Holmes Road, 6265 Hickory Hill Road, 6225 Global Drive, 4221 Pilot Drive, and 5050 East Holmes Road. Excluded: All other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

(f) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes in the manner set forth in the amended remedy section of this decision.

(g) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(h) Furnish to the Union in a timely manner the information the Union requested on June 17, 2013.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Memphis, Tennessee facilities copies of the attached notice marked "Appendix."[42] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 3 consecutive years in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed one or more of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 22, 2013.

(k) Within 14 days after service by the Region, convene meetings at its Memphis, Tennessee facilities during working time, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to employees, supervisors, and managers by either Senior Vice President Randall Coleman or Senior Employee Relations Manager Shannon Miles (or one of their successors) in the presence of a Board agent if the Region so desires, or, at the Respondent's option, by a Board agent in the presence of Coleman or Miles (or one of their successors). The Respondent shall allow a representative of the Union's choice to attend and video record each such meeting in the manner set forth in the amended remedy section of this decision. The Respondent shall give each supervisor and manager a copy of the remedial notice, shall provide sign-in sheets for supervisors and managers at the readings of the notice, and shall maintain the sign-in sheets for inspection by the Regional Director in the manner set forth in the amended remedy section of this decision. The Respondent shall allow all employees to attend these meetings without penalty or adverse employment consequences, financial or otherwise.

(l) Within 14 days after service by the Region, publish in two publications of general circulation and local interest copies of the remedial notice, signed by the Respondent's authorized representative, and continue to do so twice weekly for a period of 8 weeks. The publications will be chosen by the Regional Director for Region 15, and they need not be limited to newspapers so long as they will achieve broad coverage of the area.

(m) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[42] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

CHAIRMAN RING, dissenting in part.

I agree with the majority on most of the issues in this case. As to four specific issues, however, my colleagues and I disagree. On three of these, my colleagues reverse the judge's decision and find the unfair labor practice. For the reasons explained below, I would affirm the judge's decision and dismiss each of these allegations. Additionally, as discussed below, I would reverse the judge's finding that the Respondent's discharge of employee Stacey Williams violated the Act. Otherwise, I agree with my colleagues' violation findings,[1] but I disagree that additional extraordinary remedies are warranted beyond those ordered by the judge, for reasons explained below.

1. Discharge of Nannette French

I would affirm the judge's finding that the Respondent's discharge of employee Nannette French did not violate the Act. French was not an open union supporter. After the ballot count on May 14, 2013,[2] French passed out union cards to other employees in the Yazaki parking lot. There is no credited evidence that any manager or supervisor saw her doing so. The judge credited manager Margaret Bonner's testimony that Bonner did not see French distributing cards, and the judge also found that Supervisor Antonio Goodloe did not observe any such activity. Although Bonner testified that Goodloe saw two "union people" in the parking lot, her testimony does not establish that Goodloe saw French, whom Goodloe would recognize because Goodloe supervised French.

On May 17, French was 1 minute late clocking in after returning from lunch. The Respondent's attendance policy required the assessment of one attendance point any time an employee was late, and it provided that employees would be discharged when they had accumulated 13 or more attendance points. French's late clock-in caused her to reach 13 attendance points, and accordingly, the Respondent discharged French on May 23. No party alleges that any of French's other 12 attendance points were discriminatorily assessed.

My colleagues infer that the Respondent knew of French's union activity based on certain circumstantial evidence. The record belies this inference. French was not openly supportive of the Union prior to May 14, the judge found that neither Bonner nor Goodloe witnessed French's union activity on May 14, and the record reveals that the Respondent had no other potential source of knowledge about French's union activity. Moreover, I disagree with my colleagues that knowledge of French's union activity may be inferred from timing or from evidence of disparate treatment. Timing is inconclusive: although French was discharged not long after engaging in union activity, her discharge was closer in time to the day she accrued a thirteenth attendance point, and the discharge decision is fully and legitimately accounted for by the accrual of that thirteenth point.[3] As to disparate

[1] I also join my colleagues in adopting the judge's credibility determinations. For the reasons stated in the majority opinion, I join Member McFerran (i) in dismissing the allegation that Operations Manager Antonio Goodloe surveilled two employees' union activity on May 14, 2013, in violation of Sec. 8(a)(1) of the Act, and (ii) in affirming the judge's denial of the General Counsel's motion to amend the complaint to add a direct-dealing allegation. In adopting the judge's finding that Manager Margaret Bonner unlawfully ordered offsite employees to leave the parking lot at the Yazaki warehouse, I note that no party has challenged the application of *Hillhaven Highland House*, 336 NLRB 646 (2001), enf. sub nom. *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003), notwithstanding that the Respondent does not own the parking lot in question.

In finding that the Respondent violated Sec. 8(a)(5) of the Act by making a variety of unilateral changes in employees' terms and conditions of employment, my colleagues rely on the "peril" doctrine reaffirmed by the Board in *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). Under this doctrine, when an employer makes unilateral changes in employment terms after a representation election in which the tally of ballots shows a union victory, but before the election results are made final and the union is certified as bargaining representative, the employer makes those changes at its peril, and the changes will be unlawful under Sec. 8(a)(5) if the Board ultimately issues a certification of representative. My colleagues also rely on the *Mike O'Connor* "peril" doctrine by analogy in holding that the right afforded represented employees under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975)—the right to a union representative at an investigatory interview the employee reasonably believes may result in discipline—attaches when the tally of ballots shows that the union has won the election, not when the certification of representative issues. Although I concur with my colleagues that the Respondent violated Sec. 8(a)(5) by making various unilateral changes and Sec. 8(a)(1) when it told employee Smith Sr. that he had no *Weingarten* rights, I note my reservation regarding the *Mike O'Connor* "peril" rule. Specifically, I reiterate concern over the "Hobson's Choice" created by this rule, which requires employers to choose between refraining from implementing changes that may be necessary for the business or giving the union notice and the opportunity to bargain that may subsequently be deemed unlawful if the union is *not* certified. *Ardit Co.*, 364 NLRB No. 130, slip op. at 11 fn. 5 (2016) (Member Miscimarra, dissenting in part). In an appropriate future case, I believe the Board should consider modifying this aspect of *Mike O'Connor* to provide parties with greater certainty and stability during the postelection period.

[2] All dates are in 2013 unless otherwise stated.

[3] I agree with my colleagues that timing *is* probative of employer knowledge in Shawn Wade's case. Wade was discharged the day after he signed a union authorization card in full view of the Respondent's vice president, purportedly for clocking in and then briefly leaving the facility to move his car. But in Wade's case, the Respondent routinely treated briefly leaving the facility after clocking in as grounds for assessing an attendance point, at most. Thus, between the time Wade engaged in union activity and was discharged, he did nothing that could legitimately account for his discharge. In contrast, between the time French engaged in union activity and was discharged, she accrued a thirteenth attendance point, which was grounds for discharge. And as

treatment, although at one time the Respondent had allowed some employees to accrue more than 13 attendance points before it discharged them, most of the comparators my colleagues rely on were discharged in 2011 or earlier. On the other hand, *1 week* before the Respondent discharged French, it discharged employee Lauren Keele when she accrued her thirteenth attendance point—and the Respondent knew that Keele did not support the Union.[4] The record therefore supports the Respondent's contention that it started enforcing its attendance policy more strictly when Shannon Miles took over the human resources function in late 2011. As the contemporaneous discharge of Keele demonstrates, the discharge of French was not due to her union activity (of which the Respondent had no knowledge), but to stricter enforcement of the Respondent's attendance policy by the manager who oversaw human resources at the time French was discharged.[5] Accordingly, I would affirm the judge's dismissal of the allegation that French's discharge violated the Act.

2. Discharge of Stacey Williams

Contrary to the majority, the record does not support a finding that the Respondent discharged employee Stacey Williams because he requested union representation at a disciplinary meeting. Instead, as discussed below, I would find that the Respondent discharged Williams for his insubordinate conduct *after* the Respondent lawfully denied his *Weingarten* request. I would therefore dismiss the allegation.

On June 17, Managers David Maxey and Sara Wright held a meeting with Williams, during which Maxey accused Williams of engaging in inappropriate workplace behavior by kissing a coworker. Williams strenuously denied doing so. Although there are several different accounts of exactly what happened on June 17, it is undisputed that Williams' actions that day resulted in the Respondent issuing Williams a written warning 3 days later, on June 20. That day, Maxey and Wright called Williams to a meeting in a conference room. Wright attempted to give Williams a copy of the written warning, which the Respondent had already prepared. Williams refused to look at the warning and requested union representation. The purpose of the meeting was to issue discipline that had already been decided upon, and Wright correctly informed Williams that he did not have a right to a representative at the meeting.[6] Williams then requested representation a second time, and when Wright denied the second request, Williams stormed out of the conference room. Neither Maxey nor Wright had given Williams permission to leave the meeting, and both of them testified that, in their view, the meeting was not over yet.

After waiting a few minutes for Williams to return, Maxey and Wright followed Williams to his workstation. There, as the judge found, one or both of them asked Williams "at least twice" to return to the conference room. Williams did not do so, but instead reiterated his requests for union representation two more times. Both requests were denied. Maxey then told Williams to clock out. The Respondent subsequently discharged Williams for insubordination.

The judge found that Williams was discharged for engaging in the protected concerted activity of requesting union representation. Applying the factors articulated in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), the judge determined that Williams' behavior was not so disruptive as to lose the protection of the Act. My colleagues agree with the judge that *Atlantic Steel* is the applicable standard here and that Williams' discharge was unlawful. I disagree on both counts.

explained below, I am not persuaded by my colleagues' argument that French was treated disparately.

[4] Keele accrued her thirteenth attendance point as a result of a mistake she made clocking in with the Respondent's Kronos timekeeping system. My colleagues find that the Respondent's unilateral implementation of the Kronos system was a material, substantial, and significant change in employees' terms and conditions of employment and violated Sec. 8(a)(5). They further find that because Keele's discharge resulted from an unlawful unilateral change, the Respondent must be ordered to reinstate Keele with backpay. As explained below, I disagree that the implementation of the Kronos system constituted a material, substantial, and significant change in employment terms and conditions, and therefore I disagree that the Respondent violated Sec. 8(a)(5) when it unilaterally implemented the Kronos timekeeping system. Accordingly, I cannot join my colleagues in ordering the Respondent to reinstate Keele with backpay.

[5] My colleagues decline to rely on the Respondent's stricter enforcement of its attendance policy as a nondiscriminatory basis for French's discharge because that stricter enforcement constituted an unlawful unilateral change in violation of Sec. 8(a)(5). I disagree, for two reasons. First, the General Counsel has not alleged that the Respondent's stricter enforcement of its attendance policy violated the Act, and such an allegation falls within the sole purview of the General Counsel under Sec. 3(d). Second, even if the Respondent violated Sec. 8(a)(5) when it began enforcing its attendance policy more strictly without giving the Union notice and opportunity to bargain, there is neither allegation nor evidence that the Respondent's stricter enforcement was motivated by antiunion discrimination. Thus, even if it violated Sec. 8(a)(5), the Respondent's stricter enforcement of its attendance policy constituted a nondiscriminatory reason for French's discharge, and the Respondent may rely on that nondiscriminatory reason as an affirmative defense to the allegation that French's discharge violated Sec. 8(a)(3).

[6] See, e.g., *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979) (holding that "an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision").

First, *Atlantic Steel* does not apply here. *Atlantic Steel* applies where it is clear that an employee was disciplined or discharged for protected activity, and the only issue is whether the employee's misconduct in the course of that otherwise-protected activity lost the employee the protection of the Act. In such a situation, there is no dispute regarding the employer's motive. Here, however, the motivation for Williams' discharge *is* disputed: the General Counsel alleges that Williams was discharged for requesting a union representative, and the Respondent contends that Williams was discharged for insubordination. Where the employer's motive for taking a challenged adverse employment action is disputed, the Board applies the burden-shifting framework articulated in *Wright Line*.[7] Second, I do not agree that Williams' discharge was unlawful applying *Wright Line.* I would find that even if the General Counsel proved that Williams' request for a union representative was a motivating factor in the Respondent's decision to discharge Williams, the Respondent met its burden to prove that it would have discharged Williams for insubordination regardless of his request.

Contrary to the judge's finding, Williams was clearly insubordinate. He stormed out of a meeting with two managers without receiving permission to leave the meeting. The managers followed Williams to his workstation and asked him, at least twice, to come back to the conference room. It is undisputed that Williams did not comply. Thus, managers repeatedly asked Williams to do something, and Williams did not do it. This is insubordination, plain and simple. Contrary to the judge's analysis, it does not matter if Williams was calm when he insubordinately refused to comply with two direct orders. The essence of insubordination is the refusal to comply with a superior's order, not the manner in which the refusal is conveyed.[8]

The Respondent clearly carried its burden of showing that it typically disciplined employees for insubordination. Wright testified that a first offense of insubordination generally results in a final warning, and the record contains at least two exhibits showing that employees were disciplined for insubordination. Williams had already been issued a final warning before his insubordination on June 20. With a final warning already in Williams' file, the only disciplinary options available to the Respondent were to do nothing or to discharge him. I would find that the Respondent has shown it would have discharged Williams for insubordination on June 20 regardless of whether he engaged in any protected activity on that day. I would therefore dismiss the allegation that Williams was unlawfully discharged.

3. Discharge of Jerry Smith, Sr.

I would adopt the judge's finding that the Respondent's discharge of Jerry Smith, Sr. did not violate Section 8(a)(3). Like Williams, Smith Sr. committed clear misconduct (lying on a questionnaire) after he had already received a final warning. As discussed below, the Respondent showed that it would have discharged Smith Sr. regardless of his union activity.

As noted above, at the time Shawn Wade was discharged purportedly for leaving the workplace after clocking in, which occurred in May, employees regularly did likewise and were issued an attendance point, at most. In September, this lenient practice changed, and the Respondent put employees on notice that leaving the building without permission after clocking in would be grounds for discharge. That same month, Manager Wright reviewed video-camera footage to determine whether employees were complying with the policy, and she identified nine employees who had recently left the building during working time. Wright distributed to each of them at least one questionnaire asking if they had left the building after clocking in, and, if so, if they had permission to do so. Smith Sr.'s questionnaires asked whether he had left the building after clocking in on September 11 and 18. Smith Sr. answered "no" on both questionnaires. He reaffirmed those answers by answering "N/A" to the question whether he had permission to leave the building. At the hearing, Smith Sr. admitted that he had left the building after clocking in on both days. It is undisputed that the Respondent discharged Smith Sr. on October 2 for lying on the questionnaires. One other employee who answered a September questionnaire also stated that he had not left the building, but he came forward voluntarily to express uncertainty and concern about his answer and was permitted to amend it.

The Respondent met its *Wright Line* burden of proving that it would have discharged Smith Sr. regardless of his union activity.[9] Smith Sr. was on a final warning, which was lawfully imposed, and he gave demonstrably false answers during the Respondent's investigation. The majority states that the Respondent had no need to rely on Smith Sr.'s questionnaire because it had indisputable video evidence of his transgression. But the video obvi-

[7] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981).

[8] The majority notes that the judge discredited testimony that Williams refused to go home when asked to. It is undisputed, however, that Williams refused to return to the conference room when asked to by management. Thus, Williams was insubordinate regardless of whether he refused to obey an order to go home.

[9] As my colleagues note, there are no exceptions to the judge's finding that the General Counsel met his initial burden under *Wright Line*.

ously did not reveal whether Smith Sr. had permission to leave the building—and more importantly, a lie is a lie regardless of the Respondent's need, or lack of need, to rely on the questionnaire. The majority also states that Smith Sr. was treated disparately. Not so. Smith Sr. was the only one of the nine employees who received questionnaires who lied about leaving the building during worktime. One other employee also answered untruthfully, but he came forward voluntarily and expressed uncertainty about his answer. Smith Sr. did not express uncertainty and did not recant his lies. My colleagues' comparison of Smith Sr.'s treatment to the Respondent's treatment of Jennifer Smith fails. The Respondent *believed* Jennifer Smith lied on a questionnaire, but Smith Sr. *indisputably* lied on his questionnaires. The Respondent had video evidence proving as much. It did not have such evidence as to Jennifer Smith.[10] I would affirm the judge's dismissal of this allegation.

4. Implementation of the Kronos timekeeping and leave system

I agree with the judge, for the reasons he stated, that neither the Respondent's implementation of a new timekeeping system nor the attendant change in how employees request leave violated the Act. A unionized employer violates Section 8(a)(5) of the Act by making a material, substantial, and significant change to employees' terms and conditions of employment without giving the union reasonable advance notice and an opportunity to request bargaining. See, e.g., *Ead Motors Eastern Air Devices*, 346 NLRB 1060, 1065 (2006). Here, the 8(a)(5) allegation fails because the challenged unilateral change was not material, substantial, and significant.[11]

On April 22, the Respondent replaced its former timekeeping system with a Kronos touchscreen system, and it did so without giving the Union notice and opportunity to bargain. The Kronos time clock had more options, including options for requesting time off. The judge found that although workers took some time to get used to the new system and there were "individual mistakes or misunderstandings" in using it, there was no evidence that Kronos "caused any lasting change in the employees' work."

In *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327, 327 (1976), the Board found that replacing handwritten timecards with a time clock was not a material, substantial, and significant change to employees' terms and conditions of employment. Here, the judge analogized the Respondent's adoption of the Kronos system to an employer buying a new forklift with unfamiliar controls. Employees might take some time to get used to the new controls, but they would not experience any lasting change to their terms and conditions of employment. I agree with the judge. If anything, replacing a time clock that had manual buttons with a time clock that has a touchscreen is less of a change than the change in *Rust Craft Broadcasting,* in which the employer changed from handwritten cards to a time clock. Similarly, switching from paper to electronic leave-request forms did not rise to the level of a material, substantial and significant change. I would therefore affirm the judge's finding that the change to Kronos and the related change from paper to electronic leave requests did not constitute material, substantial, and significant changes to employees' terms and conditions of employment. I would therefore dismiss the 8(a)(5) unilateral-change allegation.

5. Remedial issues

I agree with my colleagues that, due to the Respondent's repeated, serious violations of the Act, the remedy properly should include a broad order to cease and desist from violating the Act "in any other manner," along with the extraordinary remedy of notice reading.[12] However, these remedies are sufficient, and I would not additionally order the Respondent to publish the remedial notice in two publications of broad circulation, and I would not extend the notice-posting period from the usual 60 days to 3 years.

In support of these expanded remedies, my colleagues cite *Pacific Beach Hotel*, 361 NLRB 709, 714 (2014), enfd. in relevant part sub nom. *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016). In my view, the history of violations committed by the respondent in that case was so outrageous as to render it all but *sui generis*. The Respondent's misconduct, although serious and pervasive, does not approach the level of the misconduct in that case. In *Pacific Beach Hotel*, the employer had previously engaged in egregious conduct for over a decade, and it was found to have (i) unlawfully interfered in two union elections, (ii) threatened and coerced employees, (iii) unlawfully granted wage increases and promotions to interfere with a union election, (iv) unlawfully discharged members of the union bargaining committee, (v)

[10] My colleagues also find that Smith Sr.'s discharge violated Sec. 8(a)(4). I disagree. I have found that the Respondent met its burden of proving that it would have discharged Smith Sr. for lying even absent his protected activity. That finding applies equally regardless of whether the protected activity was his testimony in Board proceedings or his union activity.

[11] I join my colleagues in adopting the judge's finding that the Respondent's unilateral implementation of a new advance-notice requirement for requesting paid time off violated Sec. 8(a)(5).

[12] I also join my colleagues in requiring all the Respondent's managers and supervisors to attend a meeting at which the notice is read.

promulgated numerous unlawful rules that restricted employees' Section 7 rights, (vi) repeatedly bargained in bad faith, (vii) unlawfully withdrew recognition from the union, (viii) unlawfully imposed discipline, and (ix) made numerous changes to employees' terms and conditions of employment without bargaining with the union.[13] Id. at 709–710. In addition to multiple Board decisions, the violations committed by the respondent in *Pacific Beach Hotel* resulted in a civil contempt order and three Section 10(j) injunctions issued by a federal court. Id. at 709 fn. 3. Moreover, when a union representative notified Pacific Beach's regional vice president of operations that certain unilateral changes the hotel had made violated an order issued by a federal judge under Section 10(j), the vice president replied, "Fuck the judge. He's wrong . . . [the changes are] not illegal unless I go to jail." Id. at 710 fn. 10. Pacific Beach's clear and overt contempt for the Board, the federal courts, and the Act prompted the Board to impose certain extraordinary remedies warranted in only the most extreme cases.

Without minimizing the Respondent's conduct, this is not such an extreme case. The Respondent's initial unfair labor practices were committed in June 2009, see *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632 (2011), enfd. 609 Fed. Appx. 656 (D.C. Cir. 2015), and the unfair labor practices at issue in this case occurred in 2012 and 2013. This is far less than the decade-long record of defiance in *Pacific Beach Hotel*. Moreover, while my colleagues point out that the Board has issued five previous decisions against the Respondent, one of those decisions involved a purely technical refusal-to-bargain violation committed to obtain appellate review of an underlying representation case,[14] and two of those decisions issued *after* the events at issue in this case. Mindful that the Board lacks statutory authority to impose punitive remedies,[15] I would reserve the 3-year notice-posting remedy and the notice-publication remedy for once-in-a-generation cases like *Pacific Beach Hotel*.

Accordingly, to the extent and for the reasons set forth above, I respectfully dissent.

[13] This list is not exhaustive.

[14] Only Board orders in unfair labor practice cases are appealable to the courts of appeals. See NLRA Sec. 10(e) and 10(f). An employer may obtain appellate review of a Board decision in a representation case, but only by petitioning for review of a Board order in an unfair labor practice case. See NLRA Sec. 9(d). Thus, to exercise its right to secure appellate review of disputed issues in a representation case, an employer *must* commit an unfair labor practice in order to obtain an appealable Board order.

[15] See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938) (Sec. 10(c) "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose . . . even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.").

Dated, Washington, D.C. August 27, 2018

John F. Ring, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT confiscate union materials from employee break areas.

WE WILL NOT order offsite employees distributing union literature in an outside, nonworking area to leave the premises.

WE WILL NOT tell you to resign if you do not like your working conditions.

WE WILL NOT tell bargaining-unit employees that you are not represented by the Union.

WE WILL NOT discharge any of you for supporting the United Steelworkers Union (the Union) or for other protected concerted activities.

WE WILL NOT refuse to bargain with the Union by unilaterally changing terms and conditions of employment of our bargaining-unit employees including by the following such unilateral changes: implementing a mandatory exercise and stretching program; implementing an advance notice requirement for employees requesting time off; changing our policy to disallow employees from using paid time off to make up your hours when you are sent home early; changing the shipping department hours from 8 hours per day, 5 days per week to 11 hours per day, 3 days per week; changing the inventory department start time from 4 a.m. to 8 a.m.; increasing enforcement of our policy prohibiting employees from

leaving the building after clocking in; increasing contributions to employee 401(k) plans; implementing new timekeeping and leave-request systems; and changing certain employees' start times.

WE WILL NOT refuse to bargain with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as your collective-bargaining representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Shawn Wade, Nannette French, Stacey Williams, Jerry Smith, Sr., and Lauren Keele full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Shawn Wade, Nannette French, Stacey Williams, Jerry Smith, Sr., and Lauren Keele whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Shawn Wade, Nannette French, Stacey Williams, Jerry Smith, Sr., and Lauren Keele, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, on request by the Union, rescind the unilateral changes in terms and conditions of employment implemented in April through September 2013.

WE WILL make our unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral changes, with interest.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at the Memphis, Tennessee facilities located at 5510 East Holmes Road, 5540 East Holmes Road, 6265 Hickory Hill Road, 6225 Global Drive, 4221 Pilot Drive, and 5050 East Holmes Road. Excluded: All other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 15 a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL furnish to the Union in a timely manner the information the Union requested on June 17, 2013.

WE WILL, within 14 days after this notice is served on us by Region 15, convene meetings at our Memphis, Tennessee facilities during working time, scheduled to ensure the widest possible attendance, at which this notice will be read to employees, supervisors, and managers by either Senior Vice President Randall Coleman or Senior Employee Relations Manager Shannon Miles (or one of their successors) in the presence of a Board agent if the Region so desires, or, at our option, by a Board agent in the presence of Coleman or Miles (or one of their successors). WE WILL allow a representative of the Union's choice to attend and record each meeting. WE WILL give each supervisor and manager a copy of this notice, WE WILL provide sign-in sheets for supervisors and managers at the readings of this notice, and WE WILL maintain the sign-in sheets for inspection by the Board. WE WILL allow you to attend one of the meetings without penalty or adverse employment consequences, financial or otherwise.

WE WILL, within 14 days after this notice is served on us by Region 15, publish copies of this notice in two publications of general circulation and local interest, and WE WILL continue to do so twice weekly for a period of 8 weeks.

OZBURN-HESSEY LOGISTICS, LLC

The Board's decision can be found at https://www.nlrb.gov/case/26-CA-092192 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

William T. Hearne, Esq. and *Linda M. Mohns Esq.,* for the General Counsel.

Ben H. Bodzy Esq. and *Stephen D. Goodwin, Esq. (Baker, Donelson, Bearman, Caldwell & Berkowitz, PC),* of Nashville and Memphis, Tennessee, for the Respondent.

Richard P. Rouco, Esq. (Quinn, Connor, Weaver, Davies & Rouco, LLP), of Birmingham, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Respondent violated the Act by discharging an employee because of his Union and protected concerted activities, by making unilateral changes in terms and conditions of employment without affording the Union notice and an opportunity to bargain over the decisions and their effects, by failing and refusing to furnish the Union with requested information relevant to and necessary for the performance of the Union's duties as exclusive bargaining representative, by removing union literature from a break room table, and by making certain statements which reasonably would chill employees in the exercise of Section 7 rights.

Procedural History

This case began October 26, 2012, when the Union, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC a/k/a United Steelworkers Union, filed an unfair labor practice charge against the Respondent, Ozburn-Hessey Logistics, LLC, in Case 26–CA–092192. The Union amended this charge on November 2, December 3 and, 18, 2012, and January 25, 2013. Also on January 25, 2013, the Union filed a charge against Respondent in Case 15–CA–097046, and amended that charge on July 31, 2013.

On May 20, 2013, the Union filed a charge against Respondent in Case 15–CA–105527. The Union amended this charge on July 15, 2013, and September 27, 2013.

On May 23, 2013, the Acting Regional Director for Region 26 issued a complaint and notice of hearing in 26–CA–092192. The Respondent filed a timely answer.

On May 30, 2013, Lauren Keele, an individual, filed a charge against the Respondent in Case 15–CA–106180, and amended this charge on July 26, 2013.

On June 3, 2013, the Union filed a charge against the Respondent in Case 15–CA–106387. Also on June 3, 2013, the Union filed a charge against the Respondent in Case 15–CA–106511. The Union filed amendments to these charges on July 15, 2013, and September 27, 2013.

On July 9, 2013, the Union filed a charge against the Respondent in Case 15–CA–108749.

On July 16, 2013, the Union filed a charge against the Respondent in Case 15–CA–109235.

On August 19, 2013, the Union filed charges against the Respondent in Cases 15–CA–111520, 15–CA–111523, and 15–CA–111581. The Union amended the charge in Case 15–CA–111520 on September 18, December 9 and 31, 2013. It amended the charge in Case 15–CA–111581 on December 31, 2013. The Union amended the charge in Case 15–CA–111523 on February 27, 2014.

On August 22, 2013, the Regional Director for Region 15 of the Board issued an order consolidating cases, consolidated complaint, and notice of hearing in cases 26–CA–092192, 15–CA–097046, and 15–CA–109235. Respondent filed a timely answer and thereafter amended its answer.

On September 30, 2013, the Regional Director for Region 15 issued a second order consolidating cases, consolidated complaint, and notice of hearing, which consolidated Case 15–CA–108749 with 26–CA–092192, 15–CA–097046, and 15–CA–109235. The Respondent filed a timely answer.

On October 31, 2013, the Regional Director for Region 15 issued a third order consolidating cases, consolidated complaint, and notice of hearing which added Cases 15–CA–105527, 15–CA–106180, 15–CA–106387, and 15–CA–106511 to the previously-consolidated 15–CA–108749, 26–CA–092192, 15–CA–097046 and 15–CA–109235. The Respondent filed a timely answer and amended answer.

On November 18, 2013, the Union filed a charge against Respondent in Case 15–CA–117208. The Union amended this charge on February 27, 2014.

On December 30, 2013, the Union filed a charge against the Respondent in Case 15–CA–199826.

On January 2, 2014, the Union filed a charge against Respondent in Case 15–CA–119925. It amended this charge on February 28, 2014.

On January 30, 2014, the Regional Director issued a fourth order consolidating cases, fourth consolidated complaint, and notice of hearing. It added Cases 15–CA–111520 and 15–CA–111581. Respondent filed a timely answer.

On February 27, 2014, the Union filed a charge against the Respondent in Case 15–CA–123315.

On March 26, 2014, the Regional Director issued a fifth order consolidating cases, fifth consolidated complaint, and notice of hearing. It added Cases 15–CA–111523 and 15–CA–119925. Respondent filed a timely answer.

On April 30, 2014, the Regional Director issued a sixth order consolidating cases, sixth consolidated complaint, and notice of hearing. (Hereafter, for brevity, I will refer to this pleading simply as the "Complaint.") This pleading added Cases 15–CA–117208, 15–CA–119826, and 15–CA–123315. The Respondent filed a timely answer.

A hearing opened before me in Memphis, Tennessee, on June 9, 2014. The parties presented evidence on that day and on the following days: June 10, 11, 12, and 13, 2014, and July 21, 22, 23, 24, and 25, 2014. On July 25, 2014, the hearing closed. Thereafter, the parties submitted briefs, which I have considered.

Admitted Allegations

Respondent admitted a number of allegations in its answer to the complaint. Based on those admissions, I make the findings discussed in this section of the decision.

Respondent admitted the filing and service of the various charges, as alleged in complaint paragraph 1 and its subparagraphs. Therefore, I find that the General Counsel has proven these allegations.

Respondent has admitted the allegations raised in complaint paragraphs 2(a), (b), (c), and 3. Based on those admissions, I find that, at all material times, the Respondent has been a limited liability company with an office and places of business in Memphis, Tennessee (Respondent's facility), and has been engaged in providing transportation, warehousing, and logistics services.

Further, I find that Respondent annually performs services valued in excess of $50,000 in states other than the State of Tennessee, and annually purchases and receives at its Memphis, Tennessee facility, directly from points outside the State of Tennessee, goods valued in excess of $50,000. Accordingly, I conclude that the Respondent meets the statutory and discretionary standards for the exercise of the Board's jurisdiction, and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act.

Respondent also has admitted, and I find, that the following individuals, named in complaint paragraph 5, are its supervisors and agents within the meaning of Section 2(11) and (13) of the Act, respectively: Director of Operations Ken Ball, Operations Manager Margaret Bonner, Senior Vice-President Randall Coleman, Operations Supervisor Stacy Deal, Human Resources Coordinator Megan Ferrone, Operations Supervisor Chris Finley, Operations Supervisor Antonio Goodloe, Human Resource Manager Lisa Johnson, Operations Supervisor Mark Kuhl, Operations Manager David Maxey, Operations Supervisor Terrence McDowell, Senior Employee Relations Manager Shannon Miles, Operations Supervisor Kyle Perkins, Operations Supervisor Chiquita Saulsberry, Operations Manager Billy Smith, Director of Operations Phil Smith, Regional Vice President Karen White, Operations Manager Jim Windisch, and Human Resources Manager Sara Wright.

Further, Respondent has admitted, and I find, that at all times material to this case, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Respondent also has admitted the allegation raised in complaint paragraph 14(b), that on May 24, 2013, the Board certified the Union as the exclusive collective-bargaining representative of employees in the following unit:

> Included: All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at the Memphis, Tennessee facilities located at: 5510 East Holmes Road; 5540 East Holmes Road, 6265 Hickory Hill Road, 6225 Global Drive, 4221 Pilot Drive, and 5050 East Holmes Road.
>
> Excluded: All other employers, including, office clerical and professional employees, guards, and supervisors as defined in the Act.

Based on the Respondent's admission, and taking administrative notice of the Board's decisions, I find that the Union is the certified exclusive representative of this unit. However, because of an unusual procedural complexity, it is not accurate to state that the Union's status as certified representative flows from the May 24, 2013 certification.

On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, ___ U.S. ___, 134 S.Ct. 2550, ___ U.S. ___ (2014), which invalidated the appointments of certain Board members. The next day, the Board issued an order setting aside the certification but retaining the case for further action in the future. On November 17, 2014, the Board issued a new certification in *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921 (2014).

Respondent's answer also admits that it took certain disciplinary actions against specific employees, although it denies that it violated the Act by doing so. These admissions will be discussed below in connection with the specific unfair labor practice allegations.

Disputed Allegations

Complaint Paragraph 6

Complaint paragraph 6 pertains to alleged conduct at Respondent's Memphis, Tennessee facility on about May 14, 2013. Complaint paragraph 6(a) alleges that Operations Manager Antonio Goodloe engaged in surveillance of employees engaged in union activity "by watching and monitoring Union organizer solicitation activity." Complaint paragraph 6(b) alleges that Goodloe ordered employees engaged in lawful union solicitation and distribution activities to leave the premises."

Respondent denies these allegations. It also denies that it thereby violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 19.

Respondent's Memphis facilities include a number of different warehouses. The Board conducted an election in the bargaining unit described above, which consisted of employees at the warehouses specified in the unit description. The location of two of these warehouses, close to each other on East Holmes Road, will be referred to below as Respondent's "main campus."

In addition to operating the warehouses where bargaining unit employees worked, the Respondent also had a contract to provide employees to work at a warehouse owned by another company, Yazaki. The Respondent's employees who worked at this location were not part of the bargaining unit.

On May 14, 2013, the Board counted the ballots cast by bargaining unit employees in an election to determine whether the Union would represent them. Among those watching the ballot count were employees Jerry Smith III and Glenora Rayford Whitley. (To avoid confusion which could arise because a number of witnesses were named Smith, I will refer to Jerry Smith III as "Smith III.") Following the count, they went to the main campus to tell other employees about the outcome.

After speaking with bargaining unit employees who worked in the buildings on the "main campus," Smith III and Whitley went to the parking lot of the nearby Yazaki warehouse. As noted above, Respondent did not own this warehouse, but some of its employees worked there pursuant to Respondent's contract with Yazaki. Smith III and Whitley did not enter the Yazaki building but rather stood on the sidewalk near the employee entrance and also in the parking lot.

Smith III testified that while he was standing there, he saw a man, whose name he did not know, in a vehicle in the parking lot. He further testified:

> Q. What kind of vehicle was it?
> A. I believe it was a type of a green SUV.
> Q. When you saw that person in the green SUV, did they get out of the SUV or were they still sitting in the SUV?
> A. They were still sitting in the SUV.
> Q. Could you see what that person was doing in the SUV?
> A. He was watching us while he was on the telephone.
> Q. And when you say he was watching you, did you see him looking directly at you?
> A. Yes, I did.
> Q. And you say he was on the telephone. What kind of phone are you talking about?
> A. A cell phone.
> Q. How was he holding that cell phone?
> A. He was holding it to his ear.
> Q. Was he talking while looking at you?
> A. Yes.
> Q. And were you--and did you look at him and see him looking at you?
> A. Yes, I did.
> Q. How long did he sit there?
> A. I would say roughly about 5, 10 minutes; 10 minutes tops.

Whitley's testimony was similar, except that she testified that the man was in a red or burgundy vehicle. Moreover, several times during her testimony, she referred to the vehicle as a truck. However, at one point, in response to a question by the General Counsel, she changed her testimony and called the vehicle an SUV.

The obvious difference between the green SUV described by Smith III and a red truck raises some concerns about the reliability of Whitley's testimony. Other parts of her testimony increase those doubts.

Specifically, there is a difference between the answer Whitley gave in response to a somewhat leading question and later portions of her testimony on direct examination. Whitley testified that the man she saw talking on the telephone while in a red or burgundy truck then approached her and told her she would have to leave where she was standing and go "to the curb," meaning the edge of Holmes Road. The problem concerns her identification of this person.

At the beginning of the testimony quoted below, the General Counsel asked Whitley if she had a conversation "with an individual who identified himself as Antonio" and she answered "Yes." However, slightly later in this same testimony, she stated that she learned the man's name from a "young lady" not otherwise identified:

> Q. While you were out in the parking lot--or while you were out at the Yazaki warehouse, did you have a conversation with an individual who identified himself as Antonio?
> A. Yes.
> Q. Did you approach Antonio or did he approach you?
> A. He came to me.
> Q. Before Antonio approached you, had you seen him in or around the parking lot?
> A. Yes.
> Q. Where had he been?
> A. He was sitting in his truck. The employee was coming--well, Nannette had went in the building to get the employees, to send them out to me to sign the union card. They was coming out. And they were signing cards as they was coming out. And I saw a truck sitting up there on the hill like. I thought he was a regular employee I didn't know. And a young lady said there go the supervisor, you know, that was our supervisor. And I looked around and asked her who was that. She said Antonio. . .

Was this "young lady" Annette French, an employee who worked at this particular warehouse and under the supervision of Antonio Goodloe? French certainly would be competent to identify Goodloe, because he was her supervisor. However, for the following reasons, I conclude that the "young lady" was not French.

Whitley referred to French as "Nannette," so it would appear likely that if the "young lady" were the same person, Whitley simply would have called her "Nannette."

Moreover, the sequence of events raises doubt that French and the "young lady" were the same person. Whitley's testimony indicates that she spoke with French, who then went inside the warehouse to let other employees know that Whitley was outside with information about the ballot count. Then, according to Whitley, seven or eight employees came out of the building, spoke with her, and signed union cards. Whitley's testimony on cross-examination makes clear that the man the "young lady" identified as "Antonio" did not arrive on the scene until after French had left:

> Q. Okay. When did you first see Antonio? Was it when you were talking to Nannette French, or was it when you were talking to the seven or eight employees?
> A. When I was talking to all the employees A young lady came to me, told me that the supervisor--she said that's a supervisor up there.
> Q. And, actually, Mr. Goodloe drove up while you were talking to the seven or eight employees or drove into the parking lot, right?
> A. You say he drove up. No, he walked up to me.
> Q. Did you see Mr. Goodloe park his car?
> A. Yeah, he parked. Yeah, I saw him park.
> Q. And he parked his car while you were talking to the seven to eight employees, correct?
> A. Yep. He parked his car. He drove in the parking lot and parked his car up there on the top at the hill.
> Q. And that was while you were talking to the seven or eight--
> A. While I was talking to the employees.
> Q. To the seven or eight employees.
> A. Yeah, when I was talking to the employees.
> Q. And that was after Ms. French had already gone back in the building?

A. Yeah, she was in the building.

Because the man did not enter the parking lot until after French had gone inside, it could not have been French who told Whitley that the man's name was "Antonio." Accordingly, that remark not only is hearsay but hearsay from someone whose identity is unknown. Absent some assurance of reliability not present here, it merits little, if any, weight.

More than one inconsistency in the testimony raises doubt. As discussed above, the first difference concerns the timing and sequence of events. French testified that her supervisor, Goodloe, drove into the parking lot while she and Whitney were talking. Whitley, however, as quoted above, described a man driving into the parking lot *after* French went inside the warehouse.

Another difference concerns location. Whitley volunteered that this man "parked his car up there on the top at the hill" but French testified that her supervisor, Goodloe, "pulled up on the parking lot and he parked like two cars from me."

As discussed above, the testimony of Whitley conflicted with that of another witness, Smith III, concerning the color of the vehicle. All of these inconsistencies, considered together, suggest the possibility that the witnesses were referring to two different men. If that is the case, it is necessary to determine which of them, if either, was "Antonio." The record does not afford a sufficient basis for such a determination.

As already noted, Whitley answered "yes" to the General Counsel's question, "did you have a conversation with an individual who identified himself as Antonio?" However, in light of Whitley's further testimony, I do not believe her one word answer to the General Counsel's leading question establishes that the man "identified himself as Antonio." At most, Whitley's testimony supports a conclusion that the man said he had some relationship with "OHL," presumably meaning Ozburn-Hessey Logistics. Thus, Whitley testified:

Q. When he said you had to leave or go out to the curb, did you say anything in response?

A. Yes.

Q. What did you tell him?

A. I asked him was he an hourly employee. He said he was OHL.

Q. Now, while this part of the conversation was going on, was Jerry Smith standing there?

A. Not at that time, when he asked them that question.

Q. So after he said--you asked if he's hourly and he said he's OHL, what happened next?

A. I asked him again. He said he were OHL. He said it to me again. And that's when Jerry walked towards me and asked me is there a problem.

Q. When Jerry walked up, what happened?

A. I asked Jerry can he make us leave the lot And Jerry told him, no, that we was OHL employees.

Q. And what happened then?

A. And then when Jerry said that, he walked towards, you know, up towards the entranceway, I guess the entrance for the CSR. He didn't go into the doors where the employees go. He walked up towards the entranceway.

The man's statement that he "was OHL" does not suffice to establish that he was a supervisor or agent of the Respondent. An employee might well have said the same thing, particularly at this warehouse, which Respondent did not own. In this context, the remark, "I'm OHL," might simply indicate that he worked for OHL rather than directly for the warehouse owner, Yazaki.

Goodloe did not testify, but his absence from the witness stand does not warrant any inference that his testimony would have been favorable to the government. Because the General Counsel has not established that the man in question was Goodloe, no statements may be attributed to him and, therefore, he had nothing to deny. Considering that Smith III, Whitley, and French testified on the 1st and 2nd days of the 10-day hearing, the General Counsel had ample time to present further evidence to identify the man who spoke to Whitley. Indeed, the government even could have subpoenaed Goodloe and asked him. I conclude that credible evidence does not establish that the man was Antonio Goodloe, as alleged in the complaint.

Apart from that problem of identification, the inconsistencies in the testimony raise doubts about its reliability. The difficulty cannot be resolved simply by crediting one witness over another because the doubts extend to the testimony of all three witnesses, Smith III, Whitley, and French.

For example, other parts of French's testimony, not related to the allegations considered here, also bear on the weight it should be accorded. For example, at one point, French testified that the drivers' entrance to the warehouse was always locked, but then admitted she had never tried to use that entrance.

French also testified that Operations Manager Bonner never stated, at an employee meeting, that "one minute late is one minute late." However, on cross-examination, French admitted giving sworn testimony that Bonner made a statement to this effect.

Considering these problems and the other inconsistencies described above, I do not have confidence in the accounts given by French, Whitley, and Smith III. Even applying the relatively undemanding preponderance-of-the-evidence standard, I conclude that the government has not proven the allegations raised in complaint paragraphs 6(a) and (b). Therefore, I recommend that the Board dismiss these allegations.

Complaint Paragraphs 9(a) and (b)

Complaint paragraphs 9(a) and (b) also pertain to unfair labor practices alleged to have occurred on about May 14, 2013. Because the events related to paragraphs 9(a) and (b) took place immediately after those discussed above, it is appropriate to discuss them at this point in the decision. Paragraph 9(a) alleges that on May 14, 2013, the Respondent, by Manager Margaret Bonner, engaged in surveillance of employees engaged in union activities. Paragraph 9(b) alleges that Bonner ordered employees engaged in lawful union solicitation and distribution activities to leave the premises. The Respondent denies these allegations.

Although it is not entirely clear, it appears from the record that the events related to complaint paragraph 9(b) came before those related to paragraph 9(a). Therefore, I will begin with the paragraph 9(b) allegations.

In Whitley's testimony, quoted above, she described her encounter with the man who described himself as "OHL" and who said that she and Smith III had to leave or go out to the curb, that is, to the street. According to Whitley, this man then went into the warehouse building. She and Smith III remained in the parking lot, but walked out towards the center of the lot.

While standing in the parking lot, Whitley and Smith III saw Operations Manager Margaret Bonner drive into the lot in a car which Whitley described as a black SUV. (However, Smith III testified that it was a white SUV.) Whitley testified that Bonner stopped the vehicle near where she, Whitley, was standing:

> Q. When she stopped her SUV, did she say anything to you?
> A. Yes.
> Q. What did she say?
> A. She told me I had to leave the property.
> Q. When she said you had to leave the property, did you respond?
> A. Yes.
> Q. What did you say?
> A. I asked her was she a supervisor or was she a manager.
> Q. What did she say?
> A. She said that I had to leave the property. She said that again, I had to leave the property.
> Q. And what happened next?
> A. Then I asked her again. I said was you a supervisor or was you a manager. And she told me she didn't work for OHL.
> Q. Did she say who she worked for?
> A. She just said she didn't work for OHL. She said it was private property.

Whitley testified that she asked the woman's name and that the woman "said her name was Margaret. I didn't get the last name, but she said Margaret something." She stated that she told the woman that she, Whitley, was an OHL employee,

Smith III also witnessed this conversation but his account differs somewhat from Whitley's. Smith III said that he saw the woman drive up in a *white* SUV. Contrary to Whitney, Smith III testified that the woman did not give her name:

> Q. During the conversation, did this woman--was it a man or a woman?
> A. A woman.
> Q. Did she identify herself?
> A. She just said she was the owner.
> Q. Did she say her name?
> A. No, she didn't.
> Q. You don't remember her saying her name. Can you describe her?
> A. All I know is she said she was the owner.

Whitley's testimony does not indicate that the woman called herself the "owner" and, in fact, makes no reference to owner. Conversely, the testimony of Smith III does not corroborate Whitley's assertion that the woman said her name was "Margaret."

Nannette French, who worked at this warehouse and who knew Margaret Bonner, was not present when Whitley and Smith III spoke with the woman in the parking lot. Although French had spoken with Whitley a few minutes earlier, she had gone back into the warehouse. Therefore, her testimony sheds no light on the woman's identity.

When the General Counsel asked Smith III what the woman in the parking lot had said, the Respondent objected that such testimony would be hearsay because no evidence established that the woman was Operations Manager Bonner or, indeed, that she held any position which would make her a supervisor or agent of Respondent. In view of the hearsay objection, the General Counsel elicited the following testimony from Smith III not as evidence but as an offer of proof:

> Q.. . .When she pulled up, what did she say to you?
> A. She said that she was the owner and we were on private property and we have to move.
> Q. Did you say anything?
> A. I said that we were employees here and we've got a right to be here.
> Q. Did she respond?
> A. Yes. She responded by saying that she don't have OHL employees at this facility.
> Q. And did you say anything after that?
> A. I think Glenora mentioned something. We got our badges and we showed her our badges that we are OHL employees and she said that no OHL employees are here so you might as well get off my property.
> Q. Okay. And after she said that, what did you and Glenora do?
> A. Well, she drove off and we got in Glenora's car and went back to the 5510 building where my car was parked at.

Bonner testified later in the hearing. This testimony supports a finding that she was the person with whom Whitley and Smith III spoke on this occasion. Respondent has admitted that Bonner is its supervisor and agent, so what she said to them would not fall within the definition of hearsay. Therefore, I have decided to receive the testimony of Smith III, quoted above, as evidence rather than merely as an offer of proof.

Having received this testimony into evidence, I must decide whether to credit it or to credit Bonner's conflicting testimony. Bonner was on her way to lunch when she received a telephone call from a supervisor at the Yazaki warehouse informing her that two people were in the parking lot, apparently in connection with the union organizing drive. She drove over to that parking lot, where she saw two individuals. Based on the total context, I conclude that they were Whitley and Smith III.

Contrary to Whitley and Smith III, Bonner testified that the two individuals were not wearing OHL badges and did not tell her that they worked for OHL. Bonner also denied saying that there were no OHL employees at the facility and similarly denied telling either of them that she was the "owner."

According to Bonner, she had contacted the Respondent's human resources department before speaking with the two individuals, and human resources representative Lisa Johnson told her to instruct the two to "move up from the lot." Bonner explained "we have trucks coming in and out on our lot, so I

told them they can do whatever they wanted to; they just need to go to the entrance of the lot to do it." Bonner testified that after she gave this instruction, the two "just got in their cars and pulled off the lot."

As discussed above, the testimony of Whitley differs from that of Smith III in a number of details, such as the color of Bonner's vehicle, and these inconsistencies affect the credibility of these witnesses. Bonner testified that she drove a black Yukon, a sport utility vehicle, or SUV, and I credit this testimony. Clearly, Bonner would know the color of the vehicle she drove, and she would have no obvious reason to testify falsely about it.

Therefore, I conclude that Smith III was mistaken when he testified that Bonner was driving a white vehicle. Additionally, I do not credit his testimony that Bonner referred to herself as the "owner," which Bonner denied. The record suggests no reason why Bonner would make such a statement and she had nothing to gain by doing so. Moreover, the words Smith III attributed to her, that she was "the owner," do not indicate what Bonner claimed to own. It seems unlikely that Bonner would make a statement so laconic as to be cryptic. However, were we to assume the remark to mean that she owned the warehouse, it would be implausibly grandiose. Crediting Bonner's denial, I find that she did not say that she was the "owner."

According to Smith III, Bonner also said that no OHL employees worked at this warehouse, but Whitley's testimony is silent on this point and does not constitute corroboration. Bonner denied making such a statement. Because Smith's testimony did not prove reliable in the matters discussed above, I doubt it here.

My observations of the witnesses lead me to conclude that Bonner's testimony is more trustworthy. Based on that testimony, I find that Bonner did not say that no OHL employees were working at that location. Additionally, I rely on the following credited testimony which Bonner gave on cross-examination by the General Counsel:

> Q. Okay. So then when you returned to the parking lot, tell me what happened.
>
> A. I saw two people on the parking lot, and I asked them to go to the edge of the parking lot, and that they could do whatever they wanted to do at the entrance to our parking lot.
>
> Q. And what did they say?
>
> A. Who are you? And I said, Margaret Bonner, the ops manager. And they got in their car and they left.
>
> Q. So, but you didn't ask them, are you OHL employees?
>
> A. No, I didn't.

Although I find, based on Bonner's credited testimony, that Whitley and Smith III did not identify themselves as Respondent's employees, that fact does not change their right to distribute union materials in the Respondent's parking lot during their off-duty time. In *Hillhaven Highland House*, 336 NLRB 646 (2001), enf. sub nom. *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003), the Board held that under Section 7 of the Act, offsite employees have a freestanding, nonderivative access right, for organizational purposes, to their employer's facilities.

Moreover, in *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632 (2011), the Board found that the Respondent in this present case violated the Act by ordering offsite employees engaged in distribution of union literature to leave premises, since offsite employees were seeking to organize fellow employees and thus had a Section 7 right to be present on Respondent's property. The Board noted that Respondent had offered no credible business justification for excluding the offsite employees. See also *ITT Industries*, 341 NLRB 937, 940–941 (2004) (respondent did not meet its burden "of demonstrating that its security needs warranted the absolute prohibition of handbilling on its property by offsite employees").

Likewise, the Respondent here has not met its burden of establishing a sufficient justification for denying its own employees access to the parking lot. It is true that Bonner referred to truck traffic on the parking lot, but the evidence does not show that Whitley and Smith III posed any impediment to such truck traffic or that their presence either created or increased any risk. Moreover, Bonner admittedly drove to this location because she had received telephone reports of union activity in the parking lot. Any asserted business justification rings hollow.

In sum, I conclude that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraph 9(b) and recommend that the Board so find.

Now, I turn to the allegation, in complaint paragraph 9(a), that on May 14, 2013, the Respondent, by Manager Margaret Bonner, engaged in surveillance of employees engaged in union activities. The General Counsel's brief argues that Goodloe first came to the parking lot, where he saw Whitley and Smith III engaged in union activity. (As discussed above, I have concluded that the General Counsel did not prove the allegations related to Goodloe because I did not credit the testimony of the government's witnesses.) The General Counsel's brief continues as follows:

> Bonner later drove her vehicle directly to the location where the organizers were standing and, after a brief discussion, sat there watching them until they left the parking lot. (Tr. 383–384). Bonner later stood in the window of the conference room, which directly overlooks the employee parking lot, and watched [employee Nannette] French speak with employees and distribute Union cards to employees for about 10 minutes. (Tr. 301–5; GC Exh. 28).

From this passage of the General Counsel's brief, it appears that the government argues that Bonner engaged in surveillance of employees' union activities in two different ways, first, by sitting in her car "watching them until they left the parking lot" and, second, by standing in the conference room inside the building and watching French through the window. With respect to the first allegation, based on Bonner's credited testimony, I find that Whitley and Smith III left the parking lot immediately after Bonner spoke with them. Therefore, I do not find that Bonner sat in her car watching them.

To prove the second allegation, that Bonner stood in the conference room and watched through the window, the General Counsel relies on the testimony of employee Nannette French.

As discussed above, at one point French had been in the parking lot, talking with Whitley, but had returned to the building. When she got off work at 2:45 p.m., French went to her car, where she had some union cards.

Other employees came to French's car to receive and sign the union cards. French testified that as she passed out the cards, "I noticed that my manager, Margaret Bonner, was in the conference room and she was watching me." According to French, the conference room window had vertical blinds which were open at the time, and she saw Bonner clearly enough to make eye contact with her.

French testified that she "pulled off the lot" about 2:57 p.m., which was 12 minutes after she got off work. However, French did not estimate when, during that 12 minutes, she noticed Bonner watching her. Although French did not estimate the distance between the conference room window and where she was standing, she did mark the location of her car on a satellite photograph of the building. From that photograph, it would appear that her car was close to the building, perhaps only one or two car lengths from it. However, the distance to the building is not necessarily the same as the distance from French to the conference room window and the location of the window is not apparent from the picture.

Bonner unequivocally denied watching French through the window. She testified that the conference room blinds were closed. Therefore, I must determine which witness to credit.

For reasons discussed above, I have some doubts about the reliability of French's testimony. In the absence of a witness corroborating French's account, I credit Bonner. Therefore, I find that Bonner did not stand at the conference room window and watch French as she passed out union cards.

It may be noted that even if I had credited French's testimony and found that Bonner had watched from the window, that finding would merely begin the analysis of whether such an act were *unlawful* in this particular instance. As will be discussed further below, and as the General Counsel's brief acknowledges, an employer lawfully may watch employees' engaged openly in protected activities on the employer's premises, except when that surveillance is out of the ordinary or done in an overly obtrusive or conspicuous manner. Whether a manager looking through a window is "out of the ordinary" depends on what is "ordinary," a norm which may vary from employer to employer and circumstance to circumstance.

Because, crediting Bonner's testimony, I find that she did not stand at the window and watch, I do not reach the issue of whether such conduct would have violated the Act had it occurred. Rather, I recommend that the Board dismiss the 8(a)(1) allegations based on Paragraph 9(a) of the complaint.

Complaint Paragraph 7(a)

Complaint Paragraph 7(a) alleges that on about May 15, 2013, the Respondent, by Director of Operations Phil Smith, confiscated and removed prounion materials from the employee break room prior to the end of breaks. Respondent denied this allegation, as well as the further allegation, in complaint Paragraph 19, that such conduct violated Section 8(a)(1) of the Act.

The complaint, when issued, also included subparagraphs 7(c) and (d), raising additional allegations. However, at hearing, the General Counsel withdrew these allegations. Therefore, I consider here only the allegations raised in subparagraphs 7(a) and (b).

On May 15, 2013, the day after the counting of ballots described above, Helen Herron, an employee at Respondent's facility at 5265 Hickory Hill Road, brought with her to work copies of a judge's decision, which she left in the break room for other employees to read. Later that day, she saw Respondent's director of operations, Phil Smith, pick up the material and remove it from the break room.

In previous proceedings, administrative law judges and the Board have issued decisions finding the Respondent guilty of committing unfair labor practices, and the Honorable Samuel H. Mays, Jr., of the United States District Court for the Western District of Tennessee, Western Division issued an April 5, 2011 order granting petition for temporary injunction. Based on the present record, it is not clear which of these documents Herron left in the break room. However, the record leaves little doubt that the document concerned allegations related to the Union's organizing campaign.

Respondent's posthearing brief acknowledges that "Mr. Smith admitted that he disposed of union literature." Smith testified, in relevant part, as follows:

> Q. Okay. Did you see any union materials on the tables in the Waterpik break room?
> A. I saw materials on the break room table.
> Q. Okay. There were things other than union material?
> A. Yes.
> Q. Okay. Did you pick up the materials off the table?
> A. I did.
> Q. Okay. Did you pick up everything that was on the table?
> A. Yes, I did.
> Q. Were there things other than union flyers?
> A. There was.
> Q. Okay. And why did you do that?
> A. That's OCD, that's my habit. When I go through a break room area, because it's an area that's, you know, for the employees to eat their meals at and take their breaks at, I make sure that if they're not on break at that time, if they left a mess behind them after they left out the last break, it's ready for them to be on their next break.
> Q. Were there any hourly employees in the break room at the time?
> A. No.

Although Smith attributed his action to his "OCD"—presumably meaning obsessive-compulsive disorder—his mental state is irrelevant because the alleged violation does not entail proof of motivation. It does not matter whether Smith removed the literature because of a psychological compulsion or because of antiunion animus.

The General Counsel's brief states that an "employer may maintain and enforce housekeeping rules that result in the confiscation of pro-union literature from nonworking areas left behind following break periods, provided it does so in a nondiscriminatory manner. See *North American Refractories Co.*,

331 NLRB 1640 (2000). For clarity, it may be helpful to note that determining whether Respondent treated the Union-related literature in "a non-discriminatory manner" involves a different analysis than used to determine whether an adverse employment action constitutes unlawful discrimination.

Sections 8(a)(4) and (3) of the Act prohibit certain kinds of employment discrimination. Because such discrimination is intentional, proof requires evidence of unlawful motivation. However, the complaint does not allege that Respondent violated Section 8(a)(4) or (3) by removing the union material. Rather, it alleges that such conduct interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act, which focuses on the harm caused by an action. As a general principle, establishing a violation of Section 8(a)(1) of the Act does not require proof of unlawful intent.

Therefore, I do not understand the words in the General Counsel's brief—"in a discriminatory manner"—to suggest that the government must prove that Director of Operations Smith acted from animus. Regardless of Smith's intent, if Respondent treated union-related literature less favorably than other reading material, such disparate treatment interfered with employees' exercise of Section 7 rights.

Smith claimed that he believed he was permitted to remove union-related materials from the break room if no employees were present at the time. Thus, he testified:

> It's my understanding that I can't go into a break room and remove union materials while employees are on a break. If that break ends, and all the employees have returned to work, then, yes, I'm allowed to go in there and clean up the break room, police the break room in any manner that I want, and then when the next break stops--starts, once again I'm not allowed to do that. . .

Smith's understanding–that he could remove union-related materials from the break room after the break ended, may have been based on a previous Board order. In *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632 (2011), the Board found that Smith had committed an 8(a)(1) violation by conduct similar to that considered here but with one difference: In that instance, there had been employees in the break room at the time Smith removed the union-related materials. The Board ordered Respondent to cease and desist from confiscating "prounion literature from breakrooms prior to the ending of breaks." 357 NLRB 1632, 1633.

Notwithstanding that order, Smith continued to confiscate union-related materials. In *Ozburn-Hessey Logistics, LLC*, 359 NLRB 1025 (2013),[1] the Board that Smith again had unlawfully removed union-related literature from a break room. Smith's conduct in that instance closely resembled his actions here, removing copies of a judge's decision which an employee had left for other employees to read.

In this earlier instance, the judicial document was an injunction against Respondent which the Board had sought from the United States District Court. In finding that Smith's confiscation of it violated the Act, the Board's administrative law judge dryly noted that "Phil Smith, ironically, confiscated the very same injunctions that ordered him to stop 'confiscating prounion literature from break areas.'" 359 NLRB 1025, 1030 fn. 4.

The Board affirmed the judge in a decision it issued on May 2, 2013, almost 2 weeks before Smith's similar conduct in the present case. Unlike the Board's 2011 order, which prohibited the confiscation of union-related materials "prior to the ending of breaks," the Board's 2013 included no such limitation. The Board ordered the Respondent to cease and desist from "confiscating union materials and related documents from employee break areas." The Board further ordered Respondent to post a notice stating, without qualification, "WE WILL NOT confiscate union materials and related documents from employee break areas."

In the present case, Respondent's brief argues that Smith's removal of the union-related materials, after the break had ended, was lawful: "[I]t is undisputed that he did so after the last break of the day, and the literature had been sitting on the break room tables since early in the morning. Nothing in the NLRA requires a company to leave union materials, or any other types of materials, sitting on its break room tables during non-break times."

To the extent this argument assumes that the Act must expressly prohibit specific conduct to make it illegal, Respondent underestimates the scope of the Act's protection. The law could not, and need not, anticipate and describe every possible way an employer might interfere with employees' rights to prohibit such interference.

In determining whether a particular action interferes with, restrains, or coerces employees in violation of Section 8(a)(1), the Board focuses on the effect such conduct reasonably would have on employees' exercise of their Section 7 rights. Employees reasonably would not view a particular action in isolation but rather would interpret its significance based on the total context. Likewise, the Board takes into account all the circumstances in determining whether an action interfered with, restrained, or coerced employees in the exercise of their Section 7 rights.

The Respondent's argument—that nothing in the Act requires an employer to leave union-related or other materials in the break room—invites me to consider Smith's removal of the

[1] In view of the Supreme Court's decision in an unrelated matter, *NLRB v. Noel Canning*, ___ U.S. ___, 134 S.Ct. 2550 (2014), which found unconstitutional the President's appointment of certain Board members, the Board issued a June 27, 2014 order setting aside its decision in *Ozburn–Hessey Logistics, LLC*, 359 NLRB 1025. On November 17, 2014, a Board panel issued a Decision, Order and Certification which affirmed the judge's rulings, findings, and conclusions and adopted the judge's recommended order "to the extent and for the reasons stated in the Decision Order and Direction reported at 359 NLRB No. 109, which is incorporated herein by reference." *Ozburn–Hessey Logistics, LLC*, 361 NLRB 921 (2014) (footnote omitted).

On November 20, 2014, the Respondent filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of this Decision, Order and Certification and thereafter the` Board cross-petitioned for enforcement. The case is pending in the Court of Appeals. Pleadings and related documents may be found at http://www.nlrb.gov/case/26–CA–024057.

literature in isolation rather than in context. However, I decline the invitation.

In the present context, Smith's act interferes with employee rights in two different ways. Obviously, it deprives employees visiting the break room of the opportunity to read the materials. Beyond that, in the context of other unfair labor practices, the conduct sends a powerful signal that the Respondent persists in its hostility to employees exercising their right to form or join a labor organization.

The present case is the latest in a series of cases involving the Respondent and its Memphis facilities. Over an extended period, and notwithstanding Board and court orders, the Respondent has persisting in committing unfair labor practices in response to the Union's organizing efforts. In this environment, Smith's confiscation of the union-related materials communicates a powerful message regarding the Respondent's continued hostility towards the Union.

In *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632 (2011), the Board affirmed the judge's findings "that the Respondent committed numerous violations of the Act." As discussed above, the Respondent's official who confiscated the union-related literature in the present case, Phil Smith, also violated the Act by confiscating prounion literature on this earlier occasion. The judge stated, in part:

> Smith removed prounion literature from nonworking areas during break time in the presence of employees. His "[n]ot in my warehouse" reaction to the prounion literature. . . confirms that his purpose was confiscating, not cleaning.

357 NLRB 1632, 1638.

Additionally, as noted above, the Board later found that Smith had unlawfully confiscated union-related literature in *Ozburn-Hessey Logistics, LLC*, 359 NLRB 1025 (2013). That he would do so a third time, notwithstanding the previous Board orders, communicates a powerful message that Respondent persists in violating the Act, to the detriment of employees' Section 7 rights.

Accordingly, I recommend that the Board find that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraph 7(a).

Complaint Paragraph 7(b)

Complaint 7(b) alleges that about August 30, 2013, Respondent, by Director of Operations Phil Smith, threatened employees with unspecified reprisals for engaging in union activities. Respondent denies this allegation.

The events in question took place in Respondent's warehouse at 5540 East Holmes Road in Memphis, on August 30, 2013. At this location, each workday morning, management has the employees gather for a meeting at the start of their shift. The operations manager for this warehouse, David Maxey, addresses the employees. However, this meeting on August 30, 2013, was somewhat unusual because a higher management official, Director of Operations Phil Smith, also was present. So was a representative of Respondent's human relations department.

One of the employees attending this meeting, Jerry H. Smith III, credibly testified that Operations Manager Maxey "said he had a union update and he proceeded by saying things like the Union just want your money, they're losing money, they just want you, so be careful about the cards you sign because you could be called to go out on strike, stuff of that nature."

An employee asked Maxey if it were against the law for him to talk about strikes and Maxey replied that it was not illegal. According to Smith III, Operations Director Phil Smith, rather than Maxey, answered the question and told the employee "you're not an attorney and you don't know what you're talking about." Smith III then raised his hand and asked Operations Director Smith if he were an attorney, and the operations director replied that he was not.

After the meeting, Smith III went to his locker and withdrew some union-related materials, which he then placed on a table in the break room. Also in the break room were Operations Director Smith, Operations Manager Maxey, and an employee, Nathaniel Jones, doing janitorial work. When Smith III put the union-related materials on the table, Operations Director Phil Smith asked Smith III if he were "on the clock" and Smith III answered that he was.

Although the witnesses agree that Smith III was in the breakroom only briefly, perhaps a minute, their accounts conflict in a number of details. Smith III gave the following testimony:

> Q. What did [Operations Director Phil Smith] say?
>
> A. He asked me was I on the clock.
>
> Q. When he made that statement, what was your response?
>
> A. My response was, yes, I'm just dropping these off, headed to work.
>
> Q. After you made that response, did Phil Smith make any other comments?
>
> A. Well, he continued to watch me as I put the books on the tables, and then as I was walking out the door, he was behind me and he said, there's going to be some repercussions behind this.
>
> Q. Do you remember him saying anything else?
>
> A. No.

When Director of Operations Phil Smith took the witness stand, he denied telling Smith III that there would be "repercussions." On the other hand, Phil Smith attributed to Smith III certain statements which Smith III denied. In the following testimony of Director of Operations Phil Smith, I have italicized portions which significantly conflict with Smith III's testimony:

> Q. Okay. Did you say anything to Mr. Smith as he was placing the union flyers on the table?
>
> A. I did. I asked him, was he on the clock?
>
> Q. What did he say?
>
> A. He said yes.
>
> Q. Okay. And then did you say anything in return?
>
> A. I did. I told him, I said you can't be placing union pamphlets out while you're on the clock. That's a violation of OHL's solicitation policy and a violation of federal law.
>
> Q. Okay. And what did he say?
>
> A. *He said he didn't care. The employees needed more current information.*

Q. All right. Did you say anything further?
A. I told him I'd get back with him later.
Q. Okay. How many times did you tell him—well, what--how many times did you tell him that he could not be putting flyers on the tables?
A. A total of twice.
Q. And he continued to do so?
A. He did. He placed them on all the six tables in the break room.
Q. Okay. And then as he, as he left, did you say anything to him?
A. *Nothing other than I would get back with him later.*
Q. Did you tell him that there would be repercussions for this?
A. *No*. [Italics added.]

However, Smith III specifically denied saying that he "didn't care." Smith III also denied saying that he wanted employees to have updated information.

Respondent's Operations Manager, David Maxey corroborated Operations Director Smith's testimony which denied making the "repercussions" remark. Additionally, Respondent introduced into evidence a note which Maxey had made on the day of the incident. This note corroborated Operation Director Smith's testimony concerning Smith III's "didn't care comment."

The testimony of employee Nathaniel Jones, who was performing janitorial duties in the break room, supports Smith III's version of events. Jones stated that Smith III did not try to hand him any literature or talk with him but simply put the reading material on the table:

Q. Okay. Once you saw Jerry in there placing the items on the tables, did you hear anyone say anything to Jerry Smith?
A. Phil was very irate about him placing the papers on the tables, saying he was supposed to be at the jobsite and that he wanted to report Jerry for it. He was irate and he was loud, and I was kind of surprised.
Q. You said that you recall Phil saying to Jerry that he was going to report this?
A. Yeah, that he was supposed to be on the floor working.
Q. Now, when--do you recall hearing Jerry say anything to Phil Smith?
A. No, I do not.
Q. Did you hear Jerry tell Phil Smith, I don't care?
A. No, I did not.
Q. Did Jerry tell Phil Smith he wanted to get information out?
A. No, he didn't. I don't recall him saying anything. He went back to work. He left out of there.

In considering which testimony to credit, I note that all of the witnesses had some interest in the outcome of the proceeding. Respondent has admitted that both Phil Smith and David Maxey are its supervisors and the evidence establishes that they are rather high-ranking managers. The complaint names both Smith III and Jones as discriminatees seeking reinstatement after being discharged.

If accurate, Jones' testimony that Operations Director Smith was "loud and irate" provides some insight into what happened, and that testimony stands uncontradicted. Jones testified before Operations Director Smith. When Smith took the stand, he acknowledged that, as the Respondent's representative, he had been in the courtroom during the proceeding and had heard all the testimony. Thus, he heard Jones describe him as irate and loud during the break room encounter, but did not dispute this description.

Operations Manager Maxey also testified after Jones but did not contradict Jones' description of Operations Director Smith's demeanor. Based on Jones' uncontested testimony, I conclude that Operations Director Smith was, in fact, loud and "very irate" about Smith III's placing the material on the table. Operations Manager Smith's irate reaction is consistent with his behavior during an earlier, similar situation.

In this previous instance, described above in connection with complaint paragraph 7(a), an employee had placed union-related materials on a break room table and then left. According to the credited testimony, Operations Director Smith called the employee's name, held the prounion material up, tore it, loudly said "not in my warehouse" and then threw the material in a garbage can. See *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632, 1638.

Smith's use of the words "my warehouse" suggests that he considered it his personal territory and regarded the presence of the unwelcome literature as a kind of trespass. In other words, he took it personally. Such a strong reaction sheds light on why Smith would persist in confiscating union-related materials notwithstanding the Board's cease-and-desist orders and the District Court's injunction. Additionally, if Smith considered his personal space defiled by the presence of the union material, his claim of "OCD"—a cleaning compulsion—is believable.

In any event, it is clear that, in the past, Director of Operations Smith had become angry when he saw union literature lying around in the warehouse and credible evidence establishes that he was angry at Smith III for leaving such material in the break room. I conclude that this anger led him to attribute to Smith III words that Smith III did not say. The manager likely believed that Smith III did not care about the rule he was flouting, but that does not mean that Smith III actually expressed that sentiment.

Based on the credited testimony, I find that Smith III did not say that he did not care (about the Respondent's rules) and, in fact, did not say anything beyond explaining that he was just dropping the materials off. Moreover, based on the credited testimony of Jones and Smith III, I find that Operations Director Smith did tell Smith III that there would be "repercussions."

All of the witnesses agree that Smith III was in the break room only briefly. Smith III estimated that he was in the room a minute, or at most 2 minutes, and I so find.

The director of operations' statement that there would be "repercussions" would violate the Act if Smith III's conduct actually were protected. In that circumstance, employees reasonably would understand the "repercussions" statement as a threat of reprisal for protected activity. However, in the discussion below concerning complaint paragraph 13(k), I conclude that the "repercussion" actually taken, the issuance of a final

warning to Smith III, was lawful. Smith III had violated a lawful no-distribution policy by distributing literature during working time.

In theory, the director of operations' "repercussions" statement still might violate Section 8(a)(1) if it reasonably communicated to employees that Respondent might discipline them for engaging in protected activity. However, I conclude that employees reasonably would understand the "repercussions" remark to be a threat of reprisal for unprotected activity, the violation of Respondent's lawful no-solicitation policy.

Therefore, I conclude that the repercussions remark did not violate Section 8(a)(1) of the Act. Therefore, I recommend that the Board dismiss the allegations related to complaint paragraph 7(b).

Complaint Paragraphs 7(c) and (d)

As noted above, the General Counsel has withdrawn complaint paragraphs 7(c) and (d). Therefore, I need not and do not make any findings regarding these matters.

Complaint Paragraphs 8(a) and (b)

Complaint paragraphs 8(a) and (b) allege that on about May 15, 2013, the Respondent, by Operations Supervisor Kyle Perkins, engaged in surveillance and created the impression of surveillance by "watching and monitoring Union organizer solicitation activities and appearing to take photographs or video recordings" of those activities. The Respondent denies these allegations as well as the conclusion that it thereby violated Section 8(a)(1) of the Act.

On May 15, 2013, employee Dwayne Nelson stood in the parking lot outside the Respondent's warehouse which stored goods for its customer, Hewlett Packard and solicited other employees to sign union cards. While employee Teresa Pressman was signing a card, Nelson saw Kyle Perkins, whom Respondent has admitted to be its supervisor and agent. Nelson testified, in part, as follows:

> Q. And did anything unusual happen while you were out there soliciting your co-workers?
>
> A. Yeah, while we were soliciting co-workers, as I came out to greet my co-workers, it was break time So my supervisor, Kyle Perkins, normally, he's smoking during the break time. But this particular day, rather than being in the smoking area, he came out on the parking lot, talking on his telephone.
>
> Q. What did you observe?
>
> A. I observed that he was looking at us. . .

Arguably, because Perkins was engaged in a cellphone conversation, he might have sought privacy by leaving the area where he and others stood to smoke during their breaks. On cross-examination, Nelson acknowledged that from where he was standing, he could not see whether there were such other smokers in that area.

The employee who signed the union card, Teressa Pressman, confirmed that from where she and Nelson were standing, they did not have a clear view of the smoking area. Pressman testified that at one point, Operations Supervisor Perkins held his cellphone out in front of him, as someone might do to take a photograph with it. However, she could not say with certainty that Perkins actually was taking a picture rather than merely trying to read a message displayed on the cellphone. Additionally, Pressman admitted on cross-examination that she had not mentioned in her pretrial affidavit that she saw Perkins holding his cellphone up and photographing them:

> Q. In your affidavit, you don't say anything about seeing Kyle Perkins holding his phone up and photographing you, do you?
>
> A. No. Actually, Dwayne told me he was taking a picture of us. And I did look over to see him.
>
> Q. But you didn't mention that in your affidavit, correct?
>
> A. No.
>
> Q. Now, how far away were you standing from where Mr. Perkins was standing?
>
> A. A good, probably 25 or 50 foot maybe—no, 25 foot. I'm going to say 25 foot.

Perkins' testimony is consistent with that of Nelson and Pressman, but only up to a point. He admitted that on this occasion he was standing outside, smoking a cigarette and talking on his cellphone, but denied holding it out with extended arm. He further testified that when he noticed Nelson and Pressman in the parking lot, he suspected that they were engaged in union activity, so he went back inside the building:

> Q. And so why did you remove yourself?
>
> A. We've been trained to not engage in that type of activity.
>
> Q. And so you didn't want to be seen out there looking at anything?
>
> A. Yes, sir. I was afraid I'd be in the position I am now.

The testimony thus conflicts concerning whether Perkins held his cellphone out as a person would do to take a photograph and, more generally, as to whether he acted in a way which reasonably would create the impression that he was engaging in surveillance of employees' union activities. Therefore, I must decide which testimony should be credited.

What weight should be accorded the fact that Pressman's pretrial affidavit does not mention Perkins holding his cellphone up and appearing to take a photograph with it? Should this omission be chalked up to inadvertence or should it be considered a reflection on the reliability of Pressman's testimony. In this particular instance, I conclude that it detracts from Pressman's credibility as a witness.

On July 15, 2013, the Union filed its first amended charge in Case 15–CA–105527. It specifically alleged, in part, as follows:

> On or about May 15, 2013, the Employer, by supervisor Cal Perkins, engaged in unlawful surveillance of employee union organizing activities and was observed taking photographs or video footage of employees engaging in lawful solicitation and distribution of union materials. . .

In some instances, an allegation not mentioned in an unfair labor practice charge will surface during the investigation, and when that happens, some witnesses interviewed earlier may not

have been asked about it when the Board agent took their statements. However, in this case, the charge which triggered the investigation itself alleged that Perkins was "observed taking photographs or video footage of employees." Because the charge itself raised the photography allegation, it would not be overlooked by an investigator following standard procedure.

Over time, human memory tends to "fill in the blanks" with information acquired from secondary sources, sometimes mixing it with first-hand information so thoroughly that it becomes difficult, even for the witness, to separate observation from hearsay. Pressman's failure to mention the photography in her pretrial affidavit raises a possibility that between the date of the affidavit and the hearing, her memory became richer in detail than what she actually had seen.

Based on this doubt about Pressman's testimony, and on my observations of the witnesses, I resolve conflicts in the testimony by crediting Perkins. Crediting his denial, I find that Perkins did not take a photograph or video and did not raise the cellphone as he would if taking a photograph or video. To the contrary, I find that he merely was talking on his cellphone. Does this conduct amount to surveillance or create the impression of surveillance of employees engaged in union activity, when such activity is taking place out in the open, in the Respondent's parking lot?

The General Counsel's brief acknowledges "that an employer may lawfully surveil employees engaged in protected activities in the open, and on or near the employer's premises." However, it continues, "conspicuous surveillance, even if on the employer's premises, may interfere with protected activity if the supervisors or company officials do something out of the ordinary or surveil in an overly obtrusive or conspicuous manner. *Alle-Kiski Medical Center*, [339 NLRB 361, 365 (2003)] (where the Board upheld the Judge's finding of surveillance when security guards were stationed near employees handbilling on company property); *Metal Industries, Inc.*, 251 NLRB 1523 (1980) (where the Board found no violation as management officials regularly stationed themselves in parking lots at the end of the day to converse with employees)."

Although Supervisor Perkins customarily went outside the building to smoke during a break, the government argues that in this particular instance, Perkins did "something out of the ordinary" because he "observed activities in the HP account parking lot, Perkins left the designated smoking area and positioned himself close to the parking lot where he could monitor the activities of the Union organizers and the employees who they were soliciting."

The argument that Perkins "left the designated smoking area and positioned himself . . . where he could monitor" union activities assumes facts not in evidence. First, the term "designated smoking area" implies that Respondent prohibited smoking outside the building except at this particular spot. If so, then leaving that specific location might suggest that Perkins intended to do something other than smoke. However, the record does not establish that Respondent prohibited outside smoking except in the smoking area. The government's argument also imputes an intent to Perkins which credible evidence does not establish.

The General Counsel thus contends that Perkins' conduct is "out of the ordinary" because of the supervisor's supposed intent. However, even leaving aside the dearth of evidence to support a finding of intent, such intent would not be relevant to this 8(a)(1) allegation. In analyzing whether a supervisor's action creates an unlawful impression of surveillance, that person's intent does not determine whether the action is ordinary or "out of the ordinary." To prove that an action is "out of the ordinary," the proponent must first establish what constitutes the norm, and then must show that the action in question was an atypical deviation from that standard.

Here, the government concedes that it was "ordinary" for Perkins, during his break, to go outside the building to an area where smokers congregate. However, the credible evidence fails to establish that Perkins typically did not walk a little further for privacy while talking on his cellphone. In the absence of evidence that the Respondent confined smokers to this one single spot, I would hesitate to assume that the smokers never left this area while having a cellphone conversation.

Moreover, the record does not establish that the General Counsel's witnesses had observed Perkins sufficiently to testify credibly about his usual practice, and there is nothing inherently suspicious about someone walking around while talking on his cellphone. To the contrary, the sight of people meandering while talking has become commonplace.

A discussion about whether behavior was "out of the ordinary" assists in analyzing a key question: What message does the behavior reasonably communicate to an average or typical employee, considering all the circumstances. These circumstances include the Respondent's history of unfair labor practices and the recent counting of ballots in the Board-conducted election. Such context certainly would sensitize employees and affect whether they reasonably would interpret Perkins' actions as surveillance of union activities.

However, the credited evidence establishes only that Perkins was talking on his cellphone and smoking a cigarette, actions which were ordinary, not out of the ordinary. Even considering the context—the Respondent's past unfair labor practices and the recent counting of ballots—neither smoking a cigarette nor talking on a cellphone reasonably would be interpreted as surveillance of union activity.

Moreover, the union activity took place openly, on the Respondent's parking lot, and Perkins was not overly obtrusive or conspicuous. According to Pressman's testimony, Perkins was 25 feet away, perhaps further. Perkins' own testimony, which I have credited, establishes that when he saw the employees and suspected they were engaged in union activities, he left.

In these circumstances, I conclude that Perkins did not engage in surveillance of union activity and that his actions did not create the impression of such surveillance. Therefore, I recommend that the Board dismiss the allegations raised in complaint paragraphs 8(a) and (b).

Complaint Paragraphs 9(c) and (d)

Complaint paragraphs 9(c) and (d) concern events which the General Counsel alleges took place on about May 17, 2013. On that date, the complaint alleges, the Respondent (paragraph 9(c)) told its employees that they should quit their employment with Respondent and find different jobs if they had complaints

about Respondent or otherwise engaged in protected concerted activities, and (paragraph 9(d)) told its employees that they were not members of the certified bargaining unit. The Respondent denies these allegations and also denies the conclusion that it thereby violated Section 8(a)(1) of the Act.

On about May 17, 2013, Operations Manager Bonner conducted a meeting of second and third shift employees at the Yazaki warehouse. At one point during the meeting, Bonner invited employees to ask questions, and some expressed concerns that some newly hired employees were making a higher wage rate. Bonner testified that she explained that the new employees received a different wage rate because they had different skills. She further testified:

> Q. And then what did you say about employees if they weren't happy?
>
> A. No. They talked about the pay, and I told them that I was unhappy about a job that I'd had before I got the job at OHL. I told them how I hated the job, and that I felt like I had a skill set that I could utilize somewhere else and that I wanted to be happy. And I—so I chose to leave the company that I was and started working at OHL. And I said, if you all feel like you have the skill set to go out and find anything different, I said, we all have that right. That's our personal right to go out and get whatever we're looking for that makes us happy. I said, but personally, if that was me, I mean, I did it for me. And that was how I said it.

Bonner's account differs from that of an employee witness, DeAngelo Walker, who testified as follows:

> Q. Tell me what you recall was the topic of this meeting and what was discussed in this meeting Who conducted it?
>
> A. Margaret, Ms. Bonner. She conducted the meeting. She came in and basically talked about employees who—how can I word this? Employees who had a problem with their pay and their job, you know, she started off like, well, anybody has a problem with what they're making or the wages that they are getting, if it's a problem, we can handle this tonight. If you don't like your job, we can find you another job.

The General Counsel's brief argues that although "the wording differs, the import of the statement as admitted by Bonner conveys the same message" as the words which Walker attributed to her, namely, "If you have complaints and are not happy, then find another job." Contrary to the General Counsel, I do not conclude that employees would reasonably understand the words, as reported by Walker, in the same way as the words admitted by Bonner.

Telling an employee that if he is dissatisfied he should quit, like the similar expression, "if you don't like it here, find another job," communicates to the employee that the burden rests on him to locate other employment. It is a not-so-veiled reminder of the effort and uncertainty which accompany looking for work.

However, Walker quoted Bonner as telling the employees that "*we* can handle this tonight. If you don't like your job, we can find you another job." (Italics added.) Those words, "we can find you another job," suggest that the Respondent would relieve the employee of the unpleasant burden. Moreover, the words "another job" could well refer to another position in the warehouse, or in one of the other nearby warehouses which Respondent operated.

In any event, I need not reach the issue of what message such language reasonably would communicate because I credit Bonner's testimony rather than Walker's concerning what Bonner said. Bonner certainly should have the better recollection of what she said because she not only heard the words but also spoke them. Moreover, Bonner is one of Respondent's managers and her interests closely align with those of Respondent. It seems unlikely that she would admit making a statement which potentially violated the Act unless she did, in fact, say the words.

Accordingly, crediting Bonner, I find that she made the statement to employees which she described in her testimony, as quoted above. The statement she admitted is more convoluted that saying "If you don't like it here, then quit," but does it communicate that latter message to employees?

The Board has consistently found violative employer statements that a union supporter who is unhappy should seek work elsewhere. Such statements suggest that union support or dissatisfaction is incompatible with continued employment. See, *El Paso Electric Co.*, 350 NLRB 151, 152 (2007), *Paper Mart*, 319 NLRB 9 (1995) (finding unlawful an employer's statement that if employee was not happy, the employee could seek employment elsewhere); see also *Tualatin Electric*, 312 NLRB 129, 134 (1993), enfd. 84 F.3d 1202 (9th Cir. 1996); *Rolligon Corp.*, 254 NLRB 22 (1981); *Stoody Co.*, 312 NLRB 1175, 1181 (1993).

For reasons discussed below, I do not find that Bonner discussed the Union during this meeting. However, to violate Section 8(a)(1), telling an employee "to just quit" can be an unfair labor practice even without an explicit reference to a labor organization or protected activity. A statement which implies that dissatisfied employees have no recourse except to seek work elsewhere can chill the exercise of Section 7 rights by communicating that doing so is futile.

The message which employees reasonably would receive depends not only on the words but the context. In my view, that context tips the balance here. Employees would be well aware of the previous unfair labor practice proceedings, the prior Board orders and the federal court injunction and reasonably would interpret Bonner's words in the context of those events. Considering that the Respondent had not abandoned its course of conduct, employees reasonably would see through Bonner's circumlocutions and conclude that she neither was waxing philosophical nor rambling nostalgically about her own experiences. They would not have to run her words through Google Translate to get the message: "Things aren't going to change, guys, so do yourself a favor and quit."

Accordingly, I conclude that Bonner's admitted statement violated Section 8(a)(1) of the Act, and recommend that the Board so find.[2]

Complaint paragraph 9(d) also concerns a statement which Bonner allegedly made at a meeting on about May 17, 2013. However, this was not the same meeting, of second and third-shift employees, which Walker attended. Rather, the General Counsel presented evidence that Bonner also spoke at a meeting of first-shift employees.

The government relies on the testimony of employee Nannette French to prove that Respondent, by Bonner, told its employees that they were not members of the certified bargaining unit. French's testimony does not establish that this meeting took place on May 17, but said "I think it was in that same week."

At one point in her testimony, French said that Bonner "called a meeting for all OHL employees" but later clarified that she meant all "department" employees on the first shift. From context, I conclude that French was referring to Respondent's first-shift employees at the Yazaki warehouse.

According to French, Bonner "just said that the Union—we is Yazaki, we didn't have anything to worry about, that Yazaki was not a part of the Union because we weren't considered Memphis OHL. . ." French further testified that Bonner took questions from employees and that she, French, asked a question:

> I asked her why are we not a part of Memphis OHL. We all live in Memphis. We're just right down the street. But she said we was Western District. It wasn't going to affect us on no terms. That we was not part of it at all.

Bonner denied ever conducting a meeting at which she said "that we are Yazaki, we didn't have anything to worry about the Union, and Yazaki was not part of the Union because it wasn't considered Memphis OHL." She further denied making such a comment to anyone. Likewise, Bonner specifically contradicted the portion of French's testimony quoted above:

> Q. Okay. Did you ever say we're the Western District?
> A. No, I didn't.
> Q. Okay. Did Nannette French ask you why we weren't—you weren't part of Memphis OHL?
> A. No, she didn't.
> Q. Okay. Were you part of Memphis OHL?
> A. Yes, we were.

This stark conflict in the testimony presents a credibility issue which must be resolved. For reasons discussed above, I have some doubt about the reliability of French's testimony. It also concerns me that here, French's version is not corroborated.

French's testimony indicates that all employees working in the Yazaki warehouse on first shift attended the meeting, and French referred to it as a "big meeting about the Union." If Bonner had made the statements French attributed to her at the large meeting French described, other employees would have heard it. Because of the absence of such corroboration, together with the doubts about French's testimony discussed above, I do not credit French's testimony but instead credit Bonner's denial. Accordingly, I find that Bonner did not make the statements which French attributed to her.

Because credited evidence does not support the allegations raised in complaint paragraph 9(d), I conclude that the Respondent did not commit the unfair labor practice alleged. Therefore, I recommend that the Board dismiss the unfair labor practice allegations arising from the conduct described in complaint paragraph 9(d). However, for the reasons discussed above, I recommend that the Board find that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraph 9(c).

Complaint Paragraphs 10(a), (b), 12(a), (b), and (c)

Complaint paragraphs 10(a) and (b) allege that on two occasions the Respondent, by Human Resources Manager Sara Wright, informed employees that they were not represented by the Union. Complaint paragraph 10(a) alleges that Wright engaged in this conduct on September 5, 2013, and complaint paragraph 10(b) alleges a similar violation on September 6, 2013. The Respondent, although admitting that Wright is its supervisor and agent, has denied these allegations and also the allegation that it thereby violated Section 8(a)(1) of the Act.

Complaint paragraphs 12(a), (b) and (c) pertain to the same situation which is the subject of paragraph 10(a), an interview Wright conducted with Jerry Smith III on September 5, 2013. Complaint paragraph 12(a) alleges that Respondent, by Wright, denied the request of Smith III to be represented by the Union during this interview. Complaint paragraph 12(b) alleges that Smith III had reasonable cause to believe that this interview would result in disciplinary action being taken against him. Complaint paragraph 12(c) alleges that Respondent, by Wright, conducted this interview even though Respondent denied the employee's request for union representation. Respondent has denied these allegations, and also the conclusion that it thereby violated Section 8(a)(1) of the Act.

Complaint Paragraph 10(a)

As discussed above in connection with complaint paragraph 7(b), on August 30, 2013, Respondent's management discussed the Union at an employee meeting in its warehouse at 5540 East Holmes Road. Following the meeting, employee Jerry Smith III obtained some union-related reading matter at his locker and left it in the breakroom. Director of Operations Phil Smith was present in the breakroom. Crediting the testimony of Smith III, I have found that Operations Director Smith said that there would be repercussions.

Those repercussions began September 5, 2013, when management called Smith III to a meeting in Operations Manager

[2] The General Counsel's brief raises one other matter pertaining to the May 17, 2013 meeting. It states that "Bonner also admitted that she told the employees in the meeting that she did not believe that it was appropriate for them to discuss employee pay rates with each other. (Tr. 2129–2130.)" Bonner did testify that she told the employees "that I had never discussed my pay with anybody, and I didn't think anybody should discuss their pay." Although I would credit this admission and find that Bonner made this statement, the complaint does not allege that Bonner's statement about discussing pay rates violated the Act. Therefore, I do not reach this issue.

Maxey's office. Maxey and Human Resources Manager Wright were present, but Wright did most of the talking. The testimony of Smith III differs markedly from that of Maxey and Wright. Smith III testified, in part, as follows:

> Q. When the--when you got to the location of the meeting, did anyone explain why you were there?
> A. Yeah, Sara Wright did.
> Q. What did she say?
> A. She said, good morning, Mr. Smith. Explain to me what happened down in the break room area with Phil.
> Q. When she said that, what did you say?
> A. I said, what incident?
> Q. Did she respond?
> A. She said, he told you not to put those books on the break room tables. And I said, he didn't tell me not to put the books on the table; he asked me was I on the clock. And she said, no, he told you not to do it, and you were insubordinate.
> Q. And what happened then?
> A. I said, wait a minute. I said, if you're going to discipline me, I need to have some representation up here to represent me in this matter.
> Q. And when you said that, what was Ms. Wright's response?
> A. She denied and say you don't have no representation and you don't have rights up here with that and, you know, we're not concerned with the Union.
> Q. What happened then?
> A. Well, then she asked me just fill out this questionnaire and bring it back because you really don't need no rights for this; just fill out the questionnaire.
> Q. And did you accept the questionnaire?
> A. No, I did not because I said you're going to deny me my representation for something like this. So I refused to take the questionnaire.
> Q. And when you--did you tell her you weren't going to take the questionnaire?
> A. I said I wasn't going to take it.
> Q. And when you told her you weren't going to take it, did she or Mr. Maxey respond?
> A. She said, fine, we've got enough information; we'll go on what we've got.
> Q. After she made that comment, do you remember anything else happening in the meeting?
> A. No, I proceeded on back to work.

The General Counsel alleges that Respondent violated the Act when Wright said "you don't have no representation and you don't have rights up here with that and, you know, we're not concerned with the Union." However, Wright specifically denied making this statement.

The testimony of the third witness to this conversation, Operations Manager Maxey, does not resolve the conflict. Maxey testified, in part, as follows:

> Q. Okay. Did he—I guess that you testified at that meeting he also asked to have a union representative
> A. Correct.
> Q. —available? And was he given the opportunity to go find somebody to
> A. No.
> Q. —a representative to come back into the meeting with him?
> A. No. We ended the conversation, and she told him he could go back to work.
> Q. All right. Why not give him the opportunity to bring somebody into the meeting and interview him?
> A. Sara was leading that discussion so, you know.
> Q. You just went along with Sara?
> A. I guess she'll have to answer that.

Maxey's testimony that "we ended the conversation" does not specify the words used to conclude it. Maxey's testimony that "we ended the conversation" would be truthful regardless of whether Wright told Smith III that he had no rights and no (union) representation. Therefore, I look to other factors in deciding which witness to credit.

If Wright made the statement which Smith III attributed to her, its lawfulness would not depend on her motive or intent. Rather, its lawfulness depends upon the effect the statement reasonably would have on employees' exercise of Section 7 rights. However, the presence of antiunion animus does affect the likelihood of whether Wright made the statement at all. In other words, someone with an antiunion agenda would be more likely to make an antiunion statement than would someone who did not have such an objective.

Considering Operations Director Smith's almost anaphylactic reaction to the presence of prounion literature in *his* warehouse and his threat that there would be "repercussions," considering the Respondent's previous unfair labor practices both extensive and still awaiting a full remedy, and considering, too, the Respondent's other unfair labor practices in this case, I conclude that Respondent was quite mindful of Smith III's protected union activities. Therefore, it is highly likely that Wright did make the statement which Smith III attributed to her. I so find.

Having found that Wright did tell Smith III that he had no representation and "no rights up here," I now consider whether this statement interfered with, restrained, or coerced employees in the exercise of the rights provided in Section 7 of the Act.

The General Counsel's brief argues that "when Wright told Smith in the investigative interview on September 5 that the employees of Respondent are not represented by a Union, she engaged in conduct which would undermine the Union's representative role, especially as the statement was made in the context of other unfair labor practices. See *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 987 [(2007)]."

The cited case involved a statement made by a successor employer that there was no union at the facility. The Board found that when the manager made that statement, the successor already had hired a majority of the predecessor's employees and therefore had an obligation to recognize and bargain with the union which had represented them. It did not matter whether or not the manager believed the statement to be true because motive was not an element of the 8(a)(1) violation.

In the present case, the Board certified the Union as the exclusive collective-bargaining representative on May 24, 2013. Wright's September 5, 2013 statement to Smith III, that he had no representation, fell within the certification year, when the Union enjoyed a conclusive presumption of majority status. Thus, there can be no doubt that the statement tended to undermine the status of the existing exclusive bargaining representative. *Windsor Convalescent Center*, above.

In reaching this conclusion, I note one procedural complexity. As discussed above, on June 26, 2014, the United States Supreme Court ruled invalid the recess appointments of two of the three Board members on the panel which issued the May 24, 2013 certification. *NLRB v. Noel Canning*, above. The Board then set aside the May 24, 2013 certification but issued a new certification on November 17, 2014, in *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921.

The Union's status as exclusive bargaining representative flows from its majority support, as manifested in the election which resulted in the certification. Setting aside the original certification for extrinsic unrelated reasons did not change this underlying fact which the certification proclaimed.

Accordingly, Wright's statement falsely informed an employee that he had no union representation and thereby interfered with, restrained, or coerced him in the exercise of Section 7 rights. Therefore, I recommend that the Board find that this statement violated Section 8(a)(1) of the Act.

Complaint Paragraphs 12(a), 12(b) and 12(c)

Complaint paragraphs 12(a), (b), and (c) concern essentially the same facts as complaint paragraph 10(a), and therefore will be discussed here, but they present a different theory of violation, a theory discussed and approved by the Supreme Court in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). When a union is the exclusive representative of a bargaining unit, an employee in that unit has a right to union representation, upon request, at an interview which the employee reasonably believes may result in disciplinary action. Applicable Board case law applies this principle only in such a unionized setting, and not to employees unrepresented by a labor organization. See *IBM Corp.*, 341 NLRB 1288 (2004), overruling *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000).

Here, the credited evidence discussed above establishes that, on September 5, 2013, Smith III requested such representation and that Human Resources Manager Wright denied the request. Therefore, I find that the government has proven the allegations raised in complaint paragraph 12(a).

Complaint paragraph 12(b) alleges that Smith had reasonable cause to believe that the interview would result in disciplinary action being taken against him. As discussed below, the Respondent did issue Smith a final warning the day after this interview. This warning concerned the same matters which Wright raised during the interview. Therefore, concluding that Smith reasonably believed that disciplinary action would result from the interview, I find that the General Counsel has proven the allegations raised in complaint paragraph 12(b).

Complaint paragraph 12(c) alleges that the Respondent, by Wright, conducted the interview even though the Respondent had denied Smith's request for union representation. Smith's credited testimony, quoted above, establishes that after Wright denied his request for a representative to be present, she asked him to fill out a questionnaire "and bring it back because you really don't need no rights for this; just fill out the questionnaire."

Smith testified that he told Wright he was not going to take the questionnaire and Wright replied "fine, we've got enough information; we'll go on what we've got." Smith then "proceeded on back to work."

Based on this testimony, I conclude that the General Counsel has not proven, as alleged in complaint paragraph 12(c), that Wright conducted the interview after denying Smith's request for representation. It is true that she asked him to fill out a questionnaire and bring it back to her. In other words, he would be completing the questionnaire outside Maxey's office, where the interview was taking place, and outside the presence of Maxey and Wright. Thus, presumably, Smith could have sought the advice and assistance of a union representative in completing the questionnaire.

Moreover, when Smith refused to take the questionnaire, Wright did not insist that he accept it or complete it, but instead told Smith that they had enough information and "we'll go on what we've got." Smith then left the office and went back to work. In these circumstances, I do not conclude that Respondent proceeded to conduct the interview after denying Smith's request for Union representation.

For reasons discussed above, the Union clearly was the exclusive bargaining representative at this time and thus the *Weingarten* principle applies to Smith's request for representation. However, under the Board's case law, the Respondent did not violate the Act here. When an employee asserts his *Weingarten* right by requesting representation, an employer lawfully may choose not to proceed with the interview and instead make the disciplinary decision without it. See *YRC Freight*, 360 NLRB 744 (2014).

Therefore, I recommend that the Board dismiss the allegations raised by complaint paragraphs 12(a), (b), and (c).

Complaint Paragraph 10(b)

Complaint paragraph 10(b) alleges, and Respondent has denied, that about September 6, 2013, Respondent, by Wright, informed employees that they were not represented by the Union. To prove this allegation, the General Counsel relies on the testimony of Smith III.

After leaving the meeting on September 5, 2013, Smith III had second thoughts about the questionnaire which Wright had asked him to fill out. He decided to obtain the questionnaire, which he then filled out and returned.

On September 6, 2013, Human Resources Director Wright again met with Smith III. This time, Operations Director Phil Smith, rather than Maxey, was present along with Wright. Based on the testimony of Smith III, which I credit, Wright told him that he was "being disciplined for the incident in the break room" and gave him a written "final warning," which Smith III refused to sign. According to Smith III, Wright replied "that's fine, you didn't have to sign it. They were going to go on the basis of what they had, that I was receiving a final warning, and

that this would be placed in my file, but I was still denied my rights for representation."

On the basis of this credited testimony, I find that management had decided to issue Smith III this disciplinary notice, and indeed had prepared it, before it called him to the meeting. Therefore, I conclude that this September 6, 2013 meeting was not an investigative interview which might lead to discipline and, accordingly, did not give rise to a *Weingarten* right to representation. See *Micelle & Oldfield, Inc.*, 357 NLRB 505 (2011).

To be sure, the allegation raised in complaint 10(b) does not invoke a *Weingarten* theory. Rather, it alleges that Wright told an employee he was not represented by the Union. However, Smith's credited testimony simply states, in Smith's words, that the warning "would be placed in my file, but I was still denied my rights for representation." Those words are not tantamount to saying that the Union did not represent Smith or other employees at all. The statement does not deny the Union's status as bargaining representative. Rather, the words reasonably would be understood to mean simply that Smith would not be allowed union representation in this particular meeting.

Considering that Smith did not have the right to a union representative at this particular meeting, telling him that he was denied the right to representation does not communicate that the Respondent would not allow the Union to perform its statutory role as exclusive representative. However, this issue certainly is a close one because it turns on what a typical employee reasonably would understand the words to mean. The myopic way lawyers parse words and nitpick is no more natural to the human condition than the posture for swinging a golf club, and more difficult to unlearn. So it is possible that a normal person, rather than a lawyer or judge, would understand "I was still denied my rights for representation" to mean that Smith was being denied his right to representation under all circumstances, not just in this interview to announce discipline.

The difficulty is that the witness did not quote the speaker's statement word for word but instead appears to have paraphrased or summarized it. When Smith III testified that Wright said "that's fine, you didn't have to sign it," it appears to be a direct quote, or close to it, with Wright addressing Smith III in the third person. However, when Smith III testified that Wright said "I was still denied my rights for representation," his use of the first person "I" suggests something less than a direct quote.

Because there is some uncertainty about Wright's exact words, and considering that the General Counsel bears the burden of proving a violation, I give the benefit of the doubt to Wright. Therefore, I do not conclude that the statement interfered with, restrained, or coerced employees in the exercise of Section 7 rights and recommend that the Board dismiss the allegations related to complaint paragraph 10(b).

Complaint Paragraphs 11(a), (b), and (c)

Complaint paragraphs 11(a), (b), and (c) allege that on about May 23, 2013, the Respondent, by Human Resources Manager Lisa Johnson, committed a *Weingarten* violation. More specifically, they allege that on this date Johnson (a) denied employee Nannette French's request to be represented by the Union during an interview, that (b) French had reasonable cause to believe that the interview would result in disciplinary action being taken against her, and that (c) Respondent, by Johnson, conducted the interview even though she had denied French's request for union representation.

Respondent denied these allegations. It argues that management did not conduct the interview to investigate French's conduct but rather to notify her that she was being discharged. See *Micelle & Oldfield, Inc.*, above.

The General Counsel's evidence supports the Respondent's argument. French's own testimony establishes that Respondent had decided to terminate her employment before the interview began:

> When I walked into her office, I saw my separation notice on her desk. So, me, I like to ask, I'm like what's going on, what have I done now. Because I know I'm usually—I don't get in trouble at work, you know, I know to go there, do my job, and go home. And she said, well, Nannette, we have to let you go.

The General Counsel's brief, arguing that French's discharge was unlawful, states that "French was never given the opportunity to provide a defense until the decision to discharge had been made and, when she attempted to provide such evidence, Respondent refused to consider it."

Respondent's refusal to consider French's side certainly indicates that the purpose of the May 23, 2013 meeting was not investigative. If the managers had summoned French to obtain information relevant to a decision yet to be made, they would have allowed her to present it. Instead, they prepared her discharge notice before she entered the room, another indication that they already had made up their minds.

The lawfulness of the decision to discharge French will be considered below, but here, I focus on whether the Respondent denied French her *Weingarten* rights during the discharge interview. Because this interview was simply to inform French of the decision already made, she had no *Weingarten* right to union representation and it was not unlawful for the Respondent to deny her such representation.

Therefore, I recommend that the Board dismiss the allegations raised in complaint paragraphs 11(a), (b), and (c).

Complaint Paragraphs 13(a) and (b)

Complaint paragraph 13(a) alleges that about October 10, 2012, Respondent suspended employee Renal Dotson. Complaint paragraph 13(b) alleges that about October 18, 2012, Respondent discharged Dotson.

The Respondent admits both allegations, but it denies that it suspended and discharged Dotson because he assisted the Union and engaged in concerted activities, as alleged in complaint paragraph 13(o). The Respondent also denies that it suspended and discharged Dotson because he was named in an unfair labor practice charge against Respondent, because he cooperated with the Board investigation, gave affidavits, and testified at previous Board hearings, as alleged in complaint paragraph 13(p).

The Respondent also denies the allegations, in complaint paragraphs 20 and 21, that its suspension and discharge of Dotson violated Section 8(a)(1) of the Act, which prohibits actions

which interfere with, restrain, or coerce employees in the exercise of Section 7 rights. 29 U.S.C. § 158(a)(1).

It further denies the allegations, in complaint paragraph 20, that the suspension and discharge of Dotson violated Section 8(a)(3) of the Act, which prohibits an employer from encouraging or discouraging membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment. 29 U.S.C. § 158(a)(3).

Additionally, it denies the allegations, in complaint paragraph 21, that its suspension and discharge of Dotson violated Section 8(a)(4) of the Act, which makes it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4).

For reasons discussed below, I conclude that Dotson's testimony cannot be trusted. Many parts of it conflict with other witnesses and with documentary evidence. Also, portions of the testimony are inherently implausible. Moreover, the certitude with which Dotson delivered the dubious testimony also has some relevance to credibility. If he indeed believed what he expected me to believe, then whatever made his workplace behavior so erratic may also have affected his ability to recall it reliably.

Dotson's job duties involved operating a forklift type vehicle in the Respondent's warehouse at 5510 East Holmes Road in Memphis. He had participated in the Union's organizing effort, cooperated in the Board's investigation of unfair labor practice charges against the Respondent, and testified at several Board hearings.

Respondent discharged Dotson in 2009. The Board sought and obtained an injunction against Respondent, pursuant to Section 10(j) of the Act and, complying with the Order of the United States District Court, the Respondent reinstated Dotson to his job in the warehouse. Dotson returned to work in April 2011.

In November 2011, Respondent suspended Dotson for 2 days, on the basis that he had been insubordinate by refusing to pay attention and by disrupting a preshift meeting and, after being sent to the human resources department, by continuing to talk on his cellphone after being told to shut it off. More specifically, the Respondent asserted that when Director of Operations Phil Smith addressed the preshift meeting, Dotson had turned his back on Smith and continued to look away from Smith even after Smith had asked him to turn around. Dotson did not dispute that he was facing away from Smith, but claimed that he had to do so because he was taking notes.

The discipline became the subject of an unfair labor practice charge which was litigated before the Honorable Margaret G. Brakebusch, who concluded that the government had carried its burden of presenting sufficient evidence to support an inference that protected activity was a motivating factor in the Respondent's decision to discipline Dotson. Judge Brakebusch further concluded that the Respondent had not carried its rebuttal burden of showing that it would have taken the same action against Dotson even if he had not engaged in protected activity:

> . . . Dotson has demonstrated an attitude of invincibility based on his prior reinstatement. I have no doubt that the working relationship between Dotson and Smith is less than amiable and that Dotson has openly displayed his disdain for Smith. Nevertheless, while Dotson's body language may have demonstrated a lack of deference for Smith and his demeanor may have been surly, the evidence does not support that Respondent would have suspended him in the absence of his prior protected activity.

Ozburn-Hessey Logistics, JD(ATL)-9-13, JD slip op. at 10 (April 26, 2013).

In the present case, the credited evidence establishes that on October 10, 2012, inside the warehouse, there was an incident in which Operations Manager Jim Windisch came into contact with a moving forklift type vehicle being operated by Dotson.[3]

The record does not establish whether or not Dotson intended to hit Windisch with the vehicle. However, the credited testimony indicates Dotson harbored hostility towards Windisch and also suggests that Dotson was not behaving in an entirely rational manner.

Windisch was not Dotson's immediate supervisor but occupied a higher position in the chain of command. Dotson's immediate supervisor, Chiquita Saulsberry, became concerned that Dotson was failing to follow her instructions, resulting in a pallet being placed in the wrong location. Saulsberry asked her boss, Windisch, to become involved. Windisch located Dotson and found that Dotson had ignored Saulsberry's instruction to move the pallet. Instead, Dotson was doing an unassigned task, helping some other employees loading a truck trailer.

At the hearing, Respondent asked Dotson about this matter during cross-examination. Dotson's inconsistent answers raise doubts about the reliability of his testimony. Dotson first denied that he was doing something other than instructed:

> Q. Okay. And while you were on the truck trying to help them let me back up. I think you said that Ms. Salisbury had asked you to move some pallets Is that right?
>
> A. Yes, sir.
>
> Q. Okay. And so instead of moving the pallets, you were trying to help the people that were on the truck, right?
>
> A. No, sir.

However, upon further questioning, Dotson admitted that he had not done his assigned task:

> Q. Okay. What is it you remember Ms. Salisbury [Saulsberry] asking you to do?
>
> A. She asked me, she asked me could I move a pallet to right there in the aisle so the pickers can pick from it.
>
> Q. Okay. And that was before or after you got on the truck to help Mr. Smith and Mr. Hughlett?
>
> A. Before.
>
> Q. Before. Okay. And did you complete that task before you got on the truck to help Mr. Smith and Mr. Hughlett?
>
> A. No, sir.

[3] The record suggests that the vehicle, called a "lift truck," serves the same purpose as a forklift but that the operator stands rather than sits. Windisch did not suffer any injury requiring treatment.

Credible evidence, consisting of Windisch's own testimony corroborated by an employee on the truck (Smith), establishes that Windisch came to the truck where Dotson was working and tried to get his attention. However, Dotson denied seeing him:

> Q. Okay. So do I understand you correctly that Mr. Windisch never came onto the trailer that you were loading?
> A. I didn't see him, no, sir.
> Q. Okay. And you would have seen him if he had been there, right?
> A. Yes, sir.

One of the workers in the truck, Jerry Smith, Jr., testified that Windisch was "trying to give [Dotson] some orders. I don't think he [Dotson] hear[d] Jim [Windisch] at the time. . ." In contrast, Dotson's own admission that he would have seen Windisch had Windisch been present, combined with Dotson's claim that he did not see Windisch, is tantamount to a denial that Windisch was present. If Windisch really had been present, as I find based on the credited testimony of Windisch and Smith, how can Dotson's failure to see him be explained?

There are several possible explanations. First, Dotson might have been impaired by some kind of substance abuse. His subsequent strange behavior, described below, would be consistent with such an impairment.

A second possibility seems somewhat less likely. Dotson may simply have chosen not to notice or acknowledge Windisch's presence. In a sense, ignoring Windisch would echo how Dotson had turned away when Operations Director Phil Smith spoke at a preshift meeting, as described in Judge Brakebusch's decision.

Third, Dotson might have been well aware of Windisch's presence but lied about it on the witness stand. There are other instances, discussed below, where it appears that Dotson rewrote the facts for his own convenience.

Based on my observations of the witnesses, I conclude that Windisch's testimony is reliable. Although Dotson denied even seeing Windisch in the trailer, I credit the following testimony of Windisch which establishes that Dotson did see and speak with him:

> Q. Where were you standing at that point?
> A. I was inside the container, too.
> Q. How far away were you from Mr. Dotson?
> A. About five feet at the most, yeah.
> Q. Did Mr. Dotson respond to you?
> A. He didn't respond.
> Q. What happened next?
> A. Then I called for him again, saying, Renal, we have to go talk about this pallet that was put up in the wrong location. And then he just started yelling at me.
> Q. What did he say?
> A. He was saying that I don't need to talk to you about anything. There is nothing that I need to talk to you about. I don't have to talk to you. And then he started to walk away.

Dotson denied even seeing Windisch, and in his version, this confrontation with Winidisch at the truck trailer did not occur. Instead, Dotson stated that he left the trailer and got on his lift truck. On cross-examination, Dotson testified, in part, as follows:

> Q. And after you finished helping Mr. Smith and Mr. Hughlett in the trailer, what did you do next?
> A. I just jumped on my lift and rode out.
> Q. And did you go to do what Ms. Salisbury [Saulsberry] had asked you to do at that point?
> A. No, sir. I went and did another replen.[4]

The accounts provided by Dotson and Windisch differ so greatly there is a kind of fork in reality which cannot be mended by reconciling minor differences. Rather, deciding what actually happened requires a stark choice between two remarkably different stories.

If the narratives offered by Dotson and Windisch played out on separate television screens, side by side, the next quarter hour on Dotson's screen would be boring. In Dotson's version, he did not see Windisch either while helping unload the truck trailer or when he walked to the reach truck and then "rode out" on it. Dotson insists that he did not encounter Windisch until 15 to 20 minutes after he left the trailer.

In contrast, during this time period there would be plenty of action on the screen showing Windisch's version. Dotson's "I don't have to talk to you" statement to Windisch was just the beginning. Dotson then left the truck trailer and walked towards his reach truck. Windisch followed.

Windisch testified that he decided to document Dotson's behavior by making a video recording with his smartphone but a problem with the settings resulted in the phone taking still photographs. According to Windisch, Dotson was walking towards his reach truck when he noticed Windisch following him and taking photographs with his phone. Windisch testified:

> Q. So after you pull out your phone and you try and engage the function unsuccessfully, what happens next?
> A. Renal had turned around and he saw that I had the phone. And he said to me what are you going to do when I knock that phone out of your hands. And then it was at that time we got a bigger situation than what originally was set for, so I said let's go up to HR and we've got to talk about this.

Dotson was walking and Windisch following when Windisch said "let's go up to HR." Then, Dotson got up on a reach truck. Windisch's testimony continues as follows:

> Q. What happened after he stood on the reach truck?
> A. So the next comment he made to me was are you going to move? And I said no, we've got to go up to HR and talk about this. And he backed up and he bumped me with the lift.

[4] The term "replen," short for replenishment, refers to a task involving the movement of stored goods from one location to another. However, it was not the work which the supervisor had instructed Dotson to do. Thus, even in Dotson's own version of the incident he continued to ignore his supervisor's instructions.

According to Windisch, after striking him with the truck, Dotson said, "I bet you move next time."

Employee Jerry Smith saw this event from a distance. Although too far away to hear what Dotson had said, Smith did see Dotson get on the reach truck and did see the truck bump Windisch. However, it differs in some details. Windisch stated that the back of the reach truck struck him but Smith's testimony suggests that Windisch was in the reach truck's forward path:

> Q. What happened after Mr. Dotson got on his reach truck?
>
> A. I remember him getting ready to pull off to leave and Jim trying to get him not leave, trying to prevent him from leaving.
>
> Q. When you say trying to prevent him from leaving, what was Mr. Windisch doing?
>
> A. He kind of like jumped in the way, like walked in the way of leaving.
>
> Q. You mean it looked like it stepped in front? Did it look like Mr. Windisch was trying to block him?
>
> A. Yes, it did. Yes, sir.
>
> Q. So as Mr. Dotson started to move, Mr. Windisch moved away from, or did he move towards the reach truck or away from the reach truck?
>
> A. I remember him moving towards the reach truck.
>
> Q. Okay. Did you see Mr. Windisch actually come into contact with the reach truck?
>
> A. Yes, sir, I did.
>
> Q. Okay. When he came into contact with the reach truck, did he fall down?
>
> A. No, I don't think he fell. He didn't fall.
>
> Q. Did he go -- did he like bounce back a few feet?
>
> A. Yeah, he was bumped. He did.

Notwithstanding this difference in detail, Smith's testimony corroborates Windisch's version in important respects, notably, that the encounter between Windisch and Dotson began when Dotson was helping unload the trailer truck, that Dotson got in a reach truck and struck Windisch with it, and that this incident took place immediately after Dotson left the trailer, not 15 to 20 minutes later.

Windisch suffered a small scratch but did not require medical attention. He told Dotson to go to the human resources (HR) department. Before focusing on what happened in the human resources department, I now consider Dotson's version of what happened on the warehouse floor.

According to Dotson, he had left the trailer, gotten on his lift and was working when he saw Windisch some distance away, at the end of the aisle, waving at him. Dotson said that he drove the lift close to where Windisch was standing, came "to a complete stop and leaned over to the left to see what he want know what's going on with the lift." Dotson further testified as follows:

> Q. Did you have your hands on the controls?
>
> A. No, sir.
>
> Q. So after you stopped the reach truck, before you got to Mr. Windisch, what happened next?
>
> A. He jumped into my lift.

Dotson described Windisch's "jump" into the lift as "like a chest bump, you know, like somebody done scored a touchdown and they give each other chest-bumps." Dotson further testified:

> Q. When he bumped into your lift, did you see him do that?
>
> A. Yes, sir.
>
> Q. What was your reaction?
>
> A. I asked him what he's trying to do, he trying to hurt himself, kill himself; this is a lift, you know, this ain't nothing to play with.
>
> Q. Did he say anything to you in response?
>
> A. Yes, sir.
>
> Q. What did he say?
>
> A. Go to HR.

The event described by Dotson departs from everyday experience. As a rule, managers do not flag down a forklift and then "chest bump" it. Even if such "chest bumps" are common on a football field after a touchdown, it would be inexplicable and bizarre, not to mention risky, for such conduct to take place in a warehouse, particularly when the object bumped is not another person but heavy industrial equipment. To believe that it happened as Dotson described, I would want to know why. However, the record reveals no plausible motivation and Windisch emphatically denied doing any such thing.

Indeed, Dotson's testimony became more cryptic, and even less believable, when it touched on Windisch's supposed motivation for chest bumping the lift truck. On direct examination, Dotson claimed to discern such a motivation when he saw Windisch holding an iPhone:

> Q. Was his arm straight up in the air or was it bent?
>
> A. It was kind of like, you know, well, like enough room for him to do a chest bump and come right back to it because I didn't hardly see this, you know, I didn't see nothing. I'm just wondering why he bumping into my lift, and then all of a sudden I look up and seen the phone, and I was like, oh, okay, I see what you're doing now.

At that point, Dotson did not elaborate. On cross-examination, the Respondent asked Dotson to explain:

> Q. Okay. I think, if I got my notes right on your direct testimony, you said I knew what he was doing, right?
>
> A. Yes, sir, after he did it, with his phone, yes, sir.
>
> Q. And what did you mean by I knew he was doing?
>
> A. After I seen him with the phone, I knew he was trying to, you know, set me up to do something.
>
> * * *
>
> Q. Okay. You just said that you think he was trying to set you up. How do you think he was trying to set you up?
>
> A. After he did it, that's when I noticed the phone in his hand.
>
> Q. But what was he doing with the phone that had to do with setting you up?
>
> A. He might have been recording himself jump into my lift.

Dotson does not explain how Windisch recording himself jumping into a lift truck possibly could be a "set up" for some disciplinary action. Even when given another opportunity to make this connection, Dotson did not:

> Q. And, Mr. Dotson, do you think he was filming you, or do you think he was filming himself?
>
> A. No clue, but I know he was up to something with chest-bumping my lift with his phone out.
>
> Q. And you said he was setting you up. In what way do you think he was setting you up?
>
> A. Because he chest-bumped my lift, and I see his phone out.

Dotson's explanation that he believed Windisch was trying to set him up because Windisch "might have been recording himself jump into my lift" doesn't make sense. However, even without this opaque testimony, I would reject Dotson's version both because Smith's testimony corroborated Windisch, and because there is no plausible reason why Windisch would "chest bump" the lift truck or try to jump into it.[5] No other evidence supports Dotson's claim that others kept telling him that a forklift had the right of way. To the contrary, the record establishes that rule 9 of Respondent's operator daily safety rules states that "Forklift operators must yield the right of way to pedestrians." However, Dotson's comment about Windisch recording *himself* jumping into the lift truck does raise a further concern.

Dotson would have an obvious motive to invent an alternative scenario to explain Windisch's collision with the forklift, an alternative that did not involve Dotson running into the manager. Such a fabrication would be an unremarkable exculpatory falsehood, certainly not an exotic or endangered species of prevarication. However, Dotson's suspicion that Windisch was trying to set him up by recording himself jumping into the lift seems more indicative of disordered thought than intent to deceive.

Moreover, Dotson's aggressive question to Windisch—"what are you going to do when I knock that phone out of your hands"—and his hostile remark after hitting Windisch with the lift truck—"I bet you move next time"—raise the possibility of an impaired mental process. Dotson's persistent disregard of his supervisor's instructions, for no apparent reason, also is not the most rational of conduct.

So, it is not surprising that Respondent's human resources department would want Dotson to undergo a drug test. However, the decision to require such a test did not depend on an observation of erratic behavior or impaired thought. Rather, Respondent had an established policy that after an accident involving equipment such as a lift truck, the operator involved would not be allowed to resume his duty until passing a drug screen.

Dotson's version of the events in human resources and at a drug testing center conflicts with the accounts of other witnesses. For the reasons stated above and supplemented below, I have little confidence in Dotson's testimony and reject those portions which conflict with other witnesses. Based on my observations of the witnesses, I consider the testimony of Lisa Johnson and Jacquelyn Porter trustworthy and particularly rely on it in summarizing the facts below.

When Dotson arrived at the human resources department, Manager Lisa Johnson administered a saliva drug test which was called, informally, a "lollipop." It consisted of a specially-treated sponge on a stick. The person being tested held the sponge in his mouth until it was thoroughly wet. This test yields a reading within a few minutes, but the test is not reliable if the person had been chewing gum.

Human Resources Manager Johnson credibly testified that she became aware that Dotson had been chewing gum when she looked in the wastebasket. Therefore, she discarded the "lollipop" and arranged for Dotson to undergo a urine drug screen at Concentra, a medical facility the Respondent used for such tests.

Dotson testified that the human resources staff actually had given him two separate "lollipop" tests and that they did not tell him that a test was invalid because he had been chewing gum. Crediting the testimony of Johnson and Operations Director Phil Smith, who also was present, I find that Dotson underwent only one "lollipop" test.

Respondent's standard procedure was to administer a "lollipop" test first, and if that test indicated the presence of drugs, to refer the employee to Concentra for a follow-up urine test. In other words, Respondent's policy was not to rely on the saliva test alone but rather to seek confirmation of positive results through a urine test administered by health care professionals in a clinical setting.

Dotson came to the human resources department late in the afternoon and the Concentra clinic closed at 6 p.m. If the staff had given him a second saliva test, and if the result had been positive, there would not have been time enough to send Dotson to Concentra before the clinic closed. Johnson consulted with Phil Smith; they decided to forego another saliva test and instead send Dotson immediately to Concentra.

Johnson arranged for a taxi to take Dotson to the clinic. In summarizing what occurred there, I rely on the testimony of Concentra representative Jacquelyn Porter, who conducted Dotson's drug test. Although Porter worked for a company, Concentra, which had a contractual relationship with Respondent, she had far less interest in the outcome of this proceeding than either Dotson or Respondent's managers. Because Por-

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[5] It may also be noted that Dotson, on cross–examination, admitted that he had heard someone say that people on equipment had to yield to pedestrians, but then, almost immediately, gave testimony to precisely the opposite effect:

> Q. Okay. Have you ever heard anyone at OHL say that people on equipment had to yield to pedestrians?
>
> A. Yes, sir.
>
> Q. Okay. And you knew that that was one of OHL's safety rules, right?
>
> A. No, sir.
>
> Q. You just thought they were saying it?
>
> A. They kept, they kept telling me the machine, how I always got the right of way.
>
> Q. They told you the machine's always got the right of way?
>
> A. Yes, sir.
>
> Q. Is that what they said?
>
> A. Yes, sir.

ter's relationship with Respondent was so highly attenuated, she was essentially a neutral witness.

Additionally, Porter's description of the drug testing procedure comports with logic and common sense. Also, I observed nothing in her demeanor on the witness stand which would raise any question about the reliability of her testimony. Therefore, I credit that testimony.

Concentra has established rather rigorous procedures to assure the integrity of the urine specimen. The person to be tested stores his personal belongings, receives a specimen cup, and is taken to a restroom with a toilet but no sink. The toilet tank is locked to prevent someone from diluting the specimen with water from the tank and the water in the toilet bowl is dyed blue.

Concentra allows the person to spend only 4 minutes in the restroom. Failure to leave the restroom within that time invalidates the test. Additionally, the specimen must be warm and free of any foreign matter which would suggest contamination. If the specimen does not meet these standards, the person being tested must give another specimen, this time in the presence of an observer of the same sex.

Based on Porter's credited testimony, I find that Dotson's failure to comply with the requirements invalidated the test. Dotson's testimony did contradict Porter's on a number of details. For example, he claimed that no one told him about the 4 minute time limit and that no one knocked on the restroom door to let him know that time was almost up. However, for reasons discussed above, I have concluded that Dotson's testimony is not trustworthy. Therefore, I reject it and credit Porter's testimony, which includes the following:

> . . . I was the only one doing the drug screens there at that time, all the other employees had left, so I asked him, you know, I called him back and he said that he was ready to be tested and went through the normal procedures of having him lock up his belongings. And I informed him, long story short, that he only had four minutes in the restroom and to give me at least half a cup or at least four to five milliliters. He said okay.
>
> He went into the restroom. And at the approximately three and a half minute mark, I began asking him to wrap it up and to come on out of the restroom. He said I can't go yet. I said, well, if you can't go, you still have to come out. We'll get you some water and let me know when you're ready to proceed with your test
>
> He stayed in. After four minutes, I knocked on the door. I said your time is up. You have to come out now. He said I'm jumping up and down to see if I can use the restroom. I said, well, either way, I'm not going to be able to take it because you stayed in past your time. So he said, okay, I think I'm doing something I said, Mr. Dotson, you need to come out of the restroom and we'll get you some water, and we'll start the process over. And then he didn't respond. But he said, oops, I dropped my cup. And, again, I asked Mr. Dotson if he would please come out of the restroom.
>
> So when he finally emerged from the restroom, he came out with maybe 15 milliliters of urine of 30, and it was discolored, did not have a temperature.
>
> And it was trashy. It had a lot of debris in the bottom. I informed him that I could not take it and that next time he goes into the restroom, there would have to be a male observer going into the restroom with him because that is standard.

Porter completed Concentra's "unusual collection form," checking the box "Specimen Out of Range And/Or Signs of Tampering," signed the form, and had Dotson initial it. Although Dotson testified that the initials were not his, I credit Porter's testimony that she watched him as he initialed it.

Dotson testified that no one advised him that he would have to provide another urine sample. However, the form Dotson initialed itself makes that requirement clear. Both Porter's credited testimony and Dotson's initials on the form contradict his denial, which I discredit as another instance of his departure from fact.

Because it was after 6 p.m., when the clinic closes, no male staff member was present to observe Dotson give another urine specimen. Therefore, Concentra did not retest him at that time.

Dotson's version of events at Concentra is remarkably different. According to Dotson, while he was in the restroom he dropped the cup with the urine specimen, spilling half of it, but the woman conducting the test did not indicate that there was a problem. Dotson testified, in part, as follows:

> Q. How much was in the cup when you picked it up after some splashing out of it?
> A. It was still over half.
> Q. Over half? Although
> A. Yeah, because, you know, it was close, and when I dropped it, you know, the waves and some splashed.
> Q. So after you picked the cup up, had you been given a cap to put on it?
> A. No, sir.
> Q. After you left the bathroom, what did you do with the cup?
> A. I put my cup right beside somebody else's up. She told me have a nice day. We'll call your job.

Dotson's initials on the "unusual collection form" belie his testimony. To believe his denial that the initials on the form were his, I would have to conclude that Porter forged them. However, she would have no reason to do so. In contrast, Dotson had a compelling reason to deny signing the form because his job might well depend on the outcome of the drug test. I conclude that he did sign the form.

Dotson claims that he telephoned Human Resources Manager Lisa Johnson the next day. According to Dotson, he told Johnson that the woman at Concentra had rushed him and that he "didn't like how things went at that drug place." Dotson testified that he suggested to Johnson that he get another drug test and that "she was like, oh, yeah, that would be a good idea."

Johnson emphatically and unequivocally denied making the statements which Dotson attributed to her. She testified as follows:

Q. Okay. Did you tell him to go get his own drug test at another provider?

A. Absolutely not.

Q. Okay. Did you tell him that would be a good idea to go to another provider?

A. No, I did not.

Q. Okay. Did you tell him that during any telephone conversation between October 10th and when his employment was terminated?

A. No.

Q. Why wouldn't you tell Mr. Dotson that?

A. Because it was not an approved vendor.

Q. And when you say an approved vendor, what do you mean by that?

A. We have an approved vendor that has our protocol on it, and we just use those, our panel.

Q. Okay. And do you accept drug tests performed by other companies?

A. No.

I credit Johnson's denial not only because of her credible demeanor on the witness stand but also because her testimony is fully consistent with Respondent's corporate culture, as reflected in the record. Clearly, Respondent's management attached importance to following proper procedure. Respondent likely chose Concentra to perform its drug testing because Concentra also went "by the book." Concentra rigorously adhered to procedure and Respondent therefore had confidence in the reliability of its testing.

In any event, the Respondent certainly would not place much stock in a drug test performed by some other company it had not vetted, particularly one selected by the person to be tested. For one of its managers to endorse such a test would come close to apostasy. Moreover, Dotson's claim that Johnson made such a statement does not stand by itself but among the ranks of implausible claims advanced by Dotson and denied by other witnesses. Therefore, I credit Johnson's denial that she ever made such a statement to Dotson.

Dotson did go to another drug testing company, where he obtained a certificate showing negative results. However, this certificate did not persuade Respondent and it does not persuade me.

In accordance with its procedure for accidents involving the operation of equipment, the Respondent would not allow Dotson to return to work until he had passed a drug test. Thus, he was on suspension as of October 10, 2012, as Respondent admits.

During this suspension, Respondent investigated the circumstances of the October 10 incident when Dotson's lift truck hit Windisch. This investigation was thorough and aptly could be termed exhaustive.

Management also looked into Dotson's claims that he had been treated poorly at Concentra and that Concentra, in effect, had used a sloppy procedure which could have resulted in someone else's urine specimen being confused with Dotson's. Specifically, Dotson had told Concentra that he had been told to put his specimen cup on a counter where another person's specimen already was sitting.

Manager Lisa Johnson went to Concentra and spoke with Porter, who said essentially the same thing to Johnson as her testimony at the hearing. Porter testified that Dotson was the only person being tested, which is quite plausible considering that Dotson had come in shortly before the clinic's closing time. Porter also testified that there was no other specimen on the counter and that it was strictly against Concentra procedure to perform a drug test on more than one person at a time.

Porter was quite credible as a witness, so it is not surprising that Johnson also would trust the information that Porter had provided and reach the conclusion that Concentra had performed the drug test properly. Dotson's claims about Concentra had been proven specious, so there was no valid reason not to send him back to that clinic for another drug test.

Respondent has a policy that when an employee has an accident while operating equipment such as a lift truck, the employee must pass a drug test before being permitted to run the equipment again. Management decided to notify Dotson to report back to work on October 18, 2012, and then to send him to Concentra for a drug test before allowing him to resume his duties.

As noted, Respondent did not accept the drug test results proffered by Dotson but instead, decided to recall Dotson to work and then, before allowing him to operate equipment, send him back to Concentra for another drug screen. This procedure comported with Respondent's policy that an equipment operator involved in an accident must pass a drug test before returning to that work.

Johnson prepared the paperwork authorizing and requesting Concentra to give Dotson the drug test but she did not tell Dotson about the test until he arrived at work on October 18. Dotson's testimony about what happened upon his arrival conflicts markedly with that of Operations Director Phil Smith and Human Resources Manager Johnson. Based upon the testimony of Smith and Johnson, which I credit, I find that they informed Dotson that he must go to Concentra to take another drug test, and that if he did not do so he would be discharged.

Dotson testified to the contrary:

Q. Okay. You told Ms. Johnson and Mr. Smith that you weren't going to go to the place that they were trying to send you to, correct?

A. No, sir.

Q. Okay. You never said that?

A. No, sir.

Q. Okay. Mr. Smith told you that refusal to go to Concentra right then would be a refusal to take a drug screen under OHL's policies, didn't he?

A. I don't recall.

In this instance, there is incontrovertible evidence that Dotson's testimony does not reflect what happened. Operations Director Smith used his cellphone to make a video recording, which documents that Dotson repeatedly said that he did not want to return to Concentra and that he refused to do so. The video also establishes that Smith warned Dotson that if he did not go to Concentra right then, it would be considered a refusal to take a drug test.

Later that same day, Dotson showed up at Concentra for the

drug test. A Concentra employee contacted the Respondent concerning authorization to perform the test. However, Respondent informed Concentra that it had discharged Dotson already, so no test was necessary.

Additionally, an October 18, 2012 letter from Senior Employee Relations Manager Shannon Miles informed Dotson: "Effective immediately, your employment with OHL is terminated based on your conduct in violation of OHL's Drug Free Workplace policy by refusing to take a drug test." Respondent has consistently maintained that it discharged Dotson because he refused to take the drug test when directed to do so.

Because the Respondent has admitted that it suspended Dotson on October 10, 2012, and discharged him 8 days later, the only undecided issues concern the lawfulness of those adverse employment actions. To resolve those issues, I will use the framework which the Board established in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employees' union activity was a substantial or motivating factor in the Respondent's taking action against them. The General Counsel meets that burden by proving union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004) (citations omitted). If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). See *El Paso Electric Co.*, 350 NLRB 151 (2007)

Clearly, the General Counsel has met the government's initial burden. Dotson testified against the Respondent in previous Board cases. Moreover, the Board had sought and obtained an injunction from the United States District Court requiring the Respondent to reinstate Dotson after an earlier discharge. The Respondent, a participant in these cases, thus well knew about Dotson's protected activities. Previous Board cases also establish that Respondent harbored antiunion animus before October 2012, when it committed the acts at issue here.

Because the General Counsel has made the required initial showing, the Respondent bears the burden of proving that the presence of an unlawful motivation during the decision-making process did not change its outcome. See *North Fork Services Joint Venture*, 346 NLRB 1025 (2006), citing *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

In *Lampi LLC*, 327 NLRB 222 (1998), the Board stated that in assessing whether a respondent has established this defense, "we do not rely on our views of what conduct should merit discharge. Rather we look to the Respondent's own documentation regarding [the alleged discriminatee's] conduct, to its "Personnel Policy" handbook, and to the evidence of how it treated other employees with recorded incidents of discipline." 327 NLRB at 222–223.

The record establishes that Respondent suspended and discharged Dotson in accordance with its established policies specifically, its policy to drug test an employee who has an accident while operating a lift truck and its policy to discharge an employee who refuses the drug test. Credited evidence establishes that Respondent has discharged other employees for refusing to take a drug test.

Evidence that an employer similarly has discharged other workers, who had not engaged in protected activities, for like violations, typically carries an employer's rebuttal burden. However, the General Counsel contends that the Respondent did not apply its policies in an even-handed manner.

The General Counsel's brief argues, in effect, that the October 10 incident in which Dotson's reach truck struck Windisch did not properly trigger (or should not have triggered) the Respondent's drug testing policy because "Respondent admits that it did not have proof that Dotson was the cause of any accident on October 10. . ." However, this argument is unpersuasive.

It is true that when management investigated the October 10 incident it received conflicting reports from different witnesses, just as the witnesses at the hearing in this case gave conflicting testimony. From these conflicting reports, Respondent did not reach a conclusion regarding what happened during the October 10 incident. Failing to reach a definitive conclusion about what happened is not the same as an admission "that it did not have proof that Dotson was the cause" of the collision, but this is not the only flaw in the General Counsel's argument.

The argument also rests on an unwarranted assumption, namely, that the Respondent's postaccident drug testing policy does not require the equipment operator to be tested unless there is proof that this employee caused the accident. The record does not establish that Respondent's policy required that there be proof of causation as a precondition of drug testing. Rather, the drug test itself is part of the process to *determine* causation.

The General Counsel's brief also argues that the Respondent did not apply its policy fairly because Respondent did not require its supervisor, Windisch, to be drug tested. However, Windisch was the pedestrian *struck* by the lift truck, not the vehicle's operator. A policy requiring an equipment operator to be tested after an accident obviously does not require someone who was not operating the equipment to be tested.

Additionally, the General Counsel's brief cites Dotson's testimony that he returned to Concentra on October 17, 2012, the day before his discharge, and sought unsuccessfully to be drug tested. Dotson certainly gave such testimony, but such a claimed visit would be wholly inconsistent with his behavior the next day when he adamantly refused to return to Concentra. The video taken by Operations Director Smith documents Dotson's vexation at being told to return to Concentra, and if he balked on October 18, why would he have been willing to go there the previous day?

The record reveals so many instances in which Dotson's testimony departs from fact that I begin to wonder whether any correlation between that testimony and reality could be statisti-

cally significant. However, there is a strong correlation with his self interest.

For the present purpose of deciding which testimony to credit, it is not necessary to determine whether Dotson "knowingly and willfully" made false statements in violation of 18 U.S.C. § 1001, or whether any of his testimony constitutes perjury within the meaning of 18 U.S.C. § 1621. Should the Board refer Dotson's testimony to the Department of Justice for criminal investigation those issues would be relevant, but I need not reach them here. It suffices to note that Dotson's testimony includes serial, material misstatements of fact that make this litigation more complex and expensive for all parties, and which utterly destroy his credibility as a witness.

In sum, I do not credit Dotson's claim.

The General Counsel's brief also argues that Respondent "intended to provoke Dotson into refusing" a drug test by telling him that he had to go back to Concentra. In that regard, the General Counsel contends that Respondent could have complied with its own drug testing policy by administering another saliva test and even if it saw a need for a urine test, there were other acceptable laboratories in the Memphis area. Therefore, the General Counsel implies that the Respondent's decision to use Concentra was suspicious.

For several reasons, I reject the General Counsel's argument. First, the General Counsel does not claim that the saliva test, performed by someone who was not a health care professional, was as accurate as a urine test done in a clinical setting. Second, the record does not establish that Respondent deviated from its established practice by using Concentra. To the contrary, it had a working relationship with Concentra.

Third, the credited evidence establishes that Respondent took Dotson's statements about Concentra seriously. One of Respondent's managers went to Concentra and interviewed Porter, who had performed the test. Before telling Dotson he had to go back to Concentra, the Respondent satisfied itself that Dotson's complaints about Concentra lacked merit.

The General Counsel argues that Respondent revealed an unlawful motive by sending Dotson back to Concentra after he had complained about it, but Respondent also knew that Dotson's complaint was false. If I should fault the Respondent for failing to give credence to falsehood after it had been debunked, I would be rewarding dishonesty and encouraging its repetition.

Fourth, the General Counsel's argument underestimates the seriousness of the situation. Based on the credited evidence, I conclude that Dotson drove his vehicle into Windisch, causing at least a minor injury. Possibly, drug use had impaired his perception and reaction time. Dotson's conduct at the drug testing center, resulting in an apparently adulterated specimen, both raises that possibility and prevents a definite answer.

If drugs had, in fact, impaired Dotson's mental functioning, that would be bad enough, but it would be even worse if Dotson had been unimpaired and had driven the vehicle into Windisch out of the anger manifested in his remark to Windisch, "I bet you move next time." That would be the crime of assault.

Either way, whether the action resulted from drug impairment or unrestrained malice, it demonstrated that Dotson could not or would not control his behavior and therefore presented a danger to other people in the warehouse. Respondent had a duty to protect its employees from this now foreseeable risk. Sending Dotson to be drug tested at a clinic Respondent had vetted and trusted reveals no improper motive.

Credited evidence does not indicate that the Respondent acted pretextually and I find that it did not. To the contrary, I conclude that Respondent's discharge of Dotson was for cause, as that term is used in Section 10(c) of the Act.

Having concluded that Respondent met its rebuttal burden under the *Wright Line* framework, I further conclude that the suspension and discharge of Dotson, as alleged in Complaint paragraphs 13(a) and (b), did not violate the Act. Therefore, I recommend that the Board dismiss these allegations.

Complaint Paragraph 13(c)

Complaint paragraph 13(c) alleges that about October 31, 2012, Respondent discharged its employee Jerry Smith Jr. Respondent has admitted this allegation. However, the Respondent denies that it discharged Smith because he assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 13(o). Likewise, it denies the allegation that its discharge of Smith violated Section 8(a)(3) and (1) of the Act, as alleged in complaint paragraph 20.

A number of different witnesses are named Smith. For brevity, and to minimize confusion, I will refer to Jerry Smith Jr. as "Smith Jr."

Respondent employed Smith Jr. as a forklift driver. His father, Jerry Smith Sr., was active in the Union's organizing effort. Although the record does not indicate that Smith Jr. engaged in quite as much union activity as his father, he did advocate the Union when talking with other employees and also wore clothing which bore the Union's insignia. Smith Jr. estimated that he wore a union shirt perhaps once a week and a union hat even more often. Because Smith Jr. wore clothing with the union emblem at work, I find both that he engaged in protected activity and that the Respondent was aware of this activity.

On May 29, 2012, Respondent issued a final warning to Smith Jr. for operating his forklift without wearing a seatbelt. The complaint does not allege that Respondent violated the Act by issuing this warning, but it is relevant here because, under the Respondent's progressive discipline system, the next violation would result in discharge.

On October 31, 2012, Respondent discharged Smith Jr. for a second violation. According to Operations Manager Windisch, he saw Smith Jr. operating his forklift without first fastening his seatbelt. There is no doubt that Smith was not wearing his seatbelt when Windisch saw him, but there is some conflict in the testimony as to whether his forklift actually was moving. On direct examination, Smith Jr. testified that he had just gotten back on the vehicle when Windisch saw him:

Q. Okay. So you were getting on your lift.
A. Yes, sir.
Q. And you saw Mr. Windisch walking towards you?
A. Yes.
Q. And you said you were getting ready to move.
A. Yes.

> Q. Had you actually started to move when Mr. Windisch told you, I know you're going to put that seatbelt on for me?
>
> A. I don't think I did, no. I wasn't moving at the time.

However, on cross-examination, Smith Jr. admitted that he had stated in his pretrial affidavit that the forklift was rolling forward when Windisch approached. Accordingly, I credit Windisch's testimony and, based on it, find that Smith Jr. was not wearing a seatbelt even though the forklift was in motion.

Windisch took Smith Jr. to Human Resources Manager Lisa Johnson, who checked personnel records, discovered that Smith Jr. had previously received a final warning for a like infraction, and informed him that his employment was being terminated. According to Johnson, Smith Jr. acknowledged that he had been driving without his seatbelt fastened:

> I just had him take a seat. I said, what's going on, and Jim said, Lisa, I saw Jerry operating a piece of equipment without his seatbelt on, and I turned to Jerry, and I said, Jerry, is that right? *And he said, yes, ma'am.* [Emphasis added.]

Under the *Wright Line* framework the Board now applies, the General Counsel does not specifically have to show a connection between an employee's protected activities and the adverse employment action, in this case, discharge. Were proof of such a nexus necessary, I would conclude that the government had failed to carry its initial burden.

Carrying this initial burden does require proof of antiunion animus, but the evidence need only establish what might be termed a generalized hostility to the Union. The General Counsel need not show that a respondent focused this hostility on the person who suffered the adverse employment action.

Here, I conclude that the government has carried its initial burden. As already noted, credited evidence establishes that Smith Jr. frequently wore to work clothing which displayed the Union name or logo, and that suffices to establish both the protected activity and Respondent's knowledge of it.

Recent prior cases involving the Respondent establish that it harbored antiunion animus. Therefore, I conclude that the General Counsel has carried the government's initial burden and that the burden shifts to Respondent to establish that it would have taken the same action even in the absence of protected activities.

To meet its rebuttal burden, Respondent introduced written warnings issued to 3 different employees, and to one manager, for similar infractions. It is true that these disciplinary actions are warnings and not discharges, but I conclude that they suffice to establish that the Respondent would have taken the same action against Smith Jr. even in the absence of protected activity.

The record does not establish that there was any employee other than Smith Jr. who, after receiving a final warning for failing to have seatbelt fastened, later was caught committing the same infraction again. The absence of such an instance is hardly surprising because the knowledge that another infraction would result in discharge would potently motivate an employee to fasten the seatbelt.

Moreover, the fact that Respondent issued a final warning to one of its supervisors, David Maxey, indicates that it took its seatbelt policy quite seriously. Because Maxey was a member of management, issuing a final warning to him would not advance any antiunion objective. Further, Respondent issued the final warning to Maxey on January 16, 2012, well before the May 29, 2012 final warning to Smith Jr. and Smith's October 31, 2012 discharge.

Respondent's seatbelt policy serves an important safety interest. Failing to discharge Smith Jr. in accordance with that policy would have undermined its credibility by showing that his earlier "final warning" had not been final after all. For this reason, and considering the discipline Respondent imposed on other employees and a supervisor, I conclude that it would have discharged Smith Jr. in any event, even in the absence of protected activity.

Accordingly, having concluded that the Respondent carried its rebuttal burden, I find that the Respondent did not violate the Act by the conduct alleged in complaint paragraph 13(c) and recommend that the Board dismiss these allegations.

Complaint Paragraph 13(d)

Complaint paragraph 13(d) alleges that about May 15, 2013, Respondent discharged its employee Shawn Wade. Respondent admits this allegation. However, it denies that it discharged Wade because he assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 13(o). It also denies that the discharge of Wade violated Section 8(a)(3) and Section 8(a)(1) of the Act, as alleged in complaint paragraph 20.

Wade was a shipping dock worker assigned to the Respondent's warehouse at 5510 East Holmes Road. He began work there in April 2011. The record does not establish that he was active in the union organizing campaign, and he testified that he did not wear union-related attire at work. To establish both protected activity and employer knowledge, the General Counsel relies on one event, Wade signing a union membership card while he stood in the picketing lot and at a time when Respondent's senior vice president drove by.

More specifically, on May 14, 2013, Wade heard that there had been a final tally of ballots which showed that the Union had won the representation election. After his shift ended, he met with another employee, Anita Wells, in the warehouse parking lot.

Wells gave Wade a union card, which Wade placed on the hood of his car and signed. On direct examination, Wade testified, in part, as follows:

> As I was signing my card, I signed my card on the hood of my car. And as I was signing, Randall Coleman, I think is his name, he was riding by, going out the guard shack, and I saw him. And we had eye contact. He was looking through his rearview mirror from the inside.

Wade testified that Coleman did not work in the warehouse and he did not know what position Coleman held, although Wade believed it was in upper management. Because of the tentativeness with which Wade identified the man as Coleman, and Wade's uncertainty as to Coleman's exact job title, I consider the identification somewhat uncertain. However, Wells

also testified that Coleman passed her and Coleman himself testified that he has an office in the building served by this parking lot. So, I believe it likely they did see Coleman pass by in his car.

Coleman likely saw Wade and Wells because any driver, even a computer operating an experimental autonomous vehicle, would or should take notice of nearby pedestrians. However, I do not credit Wade's testimony that he made eye contact with Coleman by way of the rear view mirror in Coleman's car.

Considering the distances involved and that Coleman's car was moving, it seems unlikely that Wade would have had opportunity to see into Coleman's car sufficiently to discern the driver's eyes in the rear view mirror. The General Counsel introduced into evidence aerial photographs of the warehouse and parking lot and Wells marked where she and Wade were standing and the path of Coleman's car. The exhibits and testimony do not absolutely rule out the possibility that Wade made eye contact with Coleman, but they do not make a convincing case that it actually happened.

Considering the testimony and the aerial photographs, and notwithstanding the relatively slow speed of Coleman's car as it drove out of the parking lot, I do not credit Wade's testimony that he could see Coleman's eyes in Coleman's rear view mirror. Rather, crediting Coleman's testimony, I conclude that he did not make eye contact with Wade.

However, even assuming such eye contact, the record would not establish that Coleman, a senior vice president, would recognize Wade. Moreover, even assuming for the sake of analysis that Coleman had recognized Wade, the record does not establish that Coleman would know that the paper Wade was signing was a union card.

Wade testified that the next day, he was "scheduled to come in at eight o'clock" and "was running a little late." So, Wade did not park in his usual parking area but instead parked closer to the building, in an area where "the bigwigs or whatever" would park while visiting the warehouse. Wade then hurried inside, clocked in and went to the daily preshift meeting which begins the workday.

After the preshift meeting, Wade left the building without clocking out, and without seeking a supervisor's permission. He moved his car to his regular parking area and then returned to work. At the end of his shift, Wade received word that he should go to the human resources department. There, he met with Operations Supervisor Stacey Deal and Human Resources Manager Lisa Johnson.

Johnson informed Wade that he was being discharged because he had left the warehouse and moved his car without clocking out. An "Employee Warning Notice" stated, in relevant part, as follows:

> Employee was observed parking his vehicle in a no parking zone and entering building to clock in at 8:00am on 5/15/13. Employee then attend morning pre-shift meeting and at the conclusion of the meeting, employee exited the facility (8:06am), returned to his vehicle, then moved his vehicle to a parking spot. Employee then re-entered to warehouse at 8:09am. This is a violation of OHL's Time and Attendance Policy. [*Punctuation and grammar unchanged from original.*]

Wade's signature does not appear on this document and Wade testified that he had not seen it before the hearing. He denied that he parked in a no parking zone and some evidence suggests that he actually had left his vehicle in the visitor's parking lot. However, the exact location does not make a difference because Respondent has not claimed it discharged Wade for parking in a no parking zone. Rather, it asserts that it terminated Wade's employment because, as Wade admits, he left the building without permission and without clocking out and moved his car during time he was being paid to work.

In analyzing the lawfulness of Wade's discharge using the *Wright Line* framework, I first must determine whether the government has made an initial showing sufficient to shift the burden of proceeding to Respondent. If the General Counsel has not established that protected activity was a substantial or motivating factor in the decision to discharge Wade, then the Respondent does not bear the rebuttal burden of proving that it would have taken the same action even in the absence of protected activity.

The evidence establishes that the Respondent bore animus against the Union. The government also has proven that Wade engaged in protected activity when he signed a union card. The difficult issue concerns whether the General Counsel has satisfied the remaining requirement, proving that the Respondent knew about Wade's protected activity.

To establish such knowledge, the General Counsel relies on evidence that Respondent's senior vice president, Coleman saw Wade signing the union card as Coleman drove by on his way out of the parking lot. The General Counsel's brief states, in part, as follows:

While Coleman denies seeing Wade, Wade and Wells testified specifically that Coleman drove immediately next to where they were standing and looked directly at them while Wade was filling out the Union card (Tr. 867, 1072; GCX 42, 51). General Counsel asserts that this testimony, along with Coleman's established animus and history of unfair labor practices, (See GCX 4(a)), provides sufficient evidence of Respondent's knowledge of Wade's Union activities.

For the reasons discussed above, I credit Coleman rather than Wells and Wade. Therefore, I find that Coleman did not look directly at them while Wade was filling out the union card. However, even if Coleman had looked directly at them, from his vantage point within his car, he could not easily had discerned that Wade was filling out a union card.

The portion of the General Counsel's brief quoted above seems to argue that "Coleman's established animus and history of unfair labor practices" can be considered as evidence having probative value on the issue of Respondent's knowledge. The brief does not explain how antiunion animus and past unfair labor practices could make Coleman's vision more acute. Perhaps the General Counsel is arguing that Respondent knew Wells supported the Union and therefore Coleman would be suspicious of any conversation an employee had with Wells, particularly if the employee had a pen in hand. Speculation, however, is not evidence.

The General Counsel also argues that other employees had gone to their cars without first clocking out but had suffered no disciplinary action. Presumably, from such disparate treatment the government would infer that Respondent had a motive to discriminate against Wade. The thrust of such an argument is that if the Respondent singled out Wade for disparate treatment and if it targeted him then it must have known Wade had engaged in union activity.

Such a circuitous argument would encounter a major obstacle. Many reasons exist why an employer might want to discriminate against an employee. Some of those reasons might violate no law at all. Others might violate a statute proscribing employment discrimination on the basis of race, national origin, gender, or other specifically prohibited reason but such discrimination, even if unlawful under some other statute, would not violate the National Labor Relations Act. Thus, even if credible evidence established disparate treatment, such treatment would not establish that Respondent knew that Wade had signed a union card.

Moreover, even were(?) I to make the troubling assumption that proof of disparate treatment could have some probative value on the issue of employer knowledge, which I don't, there would have to be sufficient credible evidence that Respondent actually decided to treat Wade more harshly than other employees. Evidence that other employees had gone to their cars without clocking out, but suffered no disciplinary action, would not alone suffice. The record would also need to include credible evidence that Respondent knew of these infractions but decided to overlook them.

The General Counsel's brief also argues that although "Respondent may have had such a [strict attendance] policy at some point in the past, the evidence clearly shows that it was never consistently enforced." To support this argument, the General Counsel cites Respondent's efforts to remind employees of the attendance policy:

> Furthermore, immediately after Wade's discharge, Manager Gray and Supervisor Deal made an announcement in the preshift meeting that employees were not permitted to be outside the warehouse without permission. (Tr. 549-51, 597). Later, in the 5540 building, Manager Maxey and Sara Wright, from Human Resources, informed employees in that building that they were not allowed to be outside the warehouse during working time without permission. (Tr. 111, 1228, 1299). Then, in November 2013, Respondent had employees in the 5540 building sign a policy reminder that they were not allowed to leave the warehouse during working time without permission. (GCX 59, 75). Finally, in February 2014, employee Brandon Smith was observed on more than one occasion by manager Bonner parking his car near the entrance to the Remington warehouse, going in to clock in and then leaving to park his car. (GCX 95)

In considering the General Counsel's argument, I have some difficulty understanding how evidence of Respondent's continuing efforts to inform employees of its attendance policy proves that the policy was "never consistently enforced." Moreover, I have particular difficulty understanding the General Counsel's reasoning with respect to Brandon Smith. Stating that Smith "was observed on more than one occasion . . . going in to clock in and then leaving to park his car," the brief cites General Counsel's Exhibit 95. However, that exhibit is a termination notice showing that Respondent *discharged* Brandon Smith for violating the policy. It states, in part:

> Brandon admits to knowing that he could not illegally park, clock in and then move his car while on company time. Brandon chose to ignore the instructions given to him by his manager and also ignored the rules of the company. This is grounds for immediate termination.

Contrary to the General Counsel's argument, credible evidence shows that Respondent took its attendance policy seriously, expected employees to take the policy seriously, and enforced the policy by investigating suspected violations and taking disciplinary action.

More fundamentally, even should I assume the opposite, that the evidence suggested erratic enforcement of Respondent's policy, it would not establish that the Respondent knew about Wade's union activity at the time it discharged him. Indeed, even totally random application of an attendance policy would not satisfy the requirement that the government prove knowledge of union activity. Evidence of irregular enforcement could indeed be relevant to the issue of pretextual motivation, but the analytical process does not reach that issue unless employer knowledge has been proven.

In sum, credited evidence does not establish that the Respondent knew about Wade's union activity at the time it decided to discharge him. Therefore, the General Counsel has not satisfied the requirements for an initial showing that Wade's union activity was a substantial or motivating factor in the decision to discharge him. Accordingly, the Respondent does not have a rebuttal burden and does not have to prove it would have taken the same action against Wade even in the absence of protected activity.

Accordingly, I recommend that the Board dismiss the unfair labor practice allegations concerning Respondent's discharge of Wade described in complaint paragraph 13(d).

Complaint Paragraph 13(e)

Complaint paragraph 13(e) alleges that about May 17, 2013, Respondent discharged its employee Reginald Ishmon. Respondent admits this allegation but denies that it did so because Ishmon assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 13(o). It also denies that Ishmon's discharge violated Section 8(a)(3) and (1) of the Act, as alleged in complaint paragraph 20.

Reginald Ishmon began work, as a direct employee of Respondent, on about December 17, 2012, after working for a temporary service, Staffmark. He operated vehicles such as reach trucks in the Yazaki warehouse.

Ishmon testified that on May 16, 2013, he was in the warehouse parking lot while on break and spoke with a man and a woman he did not know, but who wore Respondent's identification badges. Presumably, they were employed at one of Respondent's other warehouses.

The woman gave him a union card. However, Ishmon did

not sign the card but rather took it with him and went back into the building. He testified that as he was leaving, he saw Operations Supervisor Goodloe approach:

> Q. And did you see Mr. Goodloe before or after you had gotten the card?
> A. Before.
> Q. You saw Mr. Goodloe before you had gotten the card?
> A. No, no, no, ma'am. It was like when they gave me the card, that's when I seen Mr. Goodloe, when they gave me the card.
> Q. And did you—were you present—you said Mr. Goodloe approached while you were standing with the other two people.
> A. Yes, ma'am.
> Q. And what did you overhear?
> A. No, ma'am. I walked off because my break was almost over, so I went into the building.
> Q. Did you hear any part of the conversation?
> A. No, ma'am.
> Q. I thought you just testified that you heard Mr. Goodloe saying something.
> A. Well, yeah, just as far as anything after that, I didn't, you know.
> Q. But tell me what you did hear.
> A. He just asked you all got to leave the premises or you all are not allowed up here. And like I said, at that time, I was just walking off and I didn't really try to hear anything else because I was going back on lunch break or going back on my break.

Ishmon gave this testimony on June 10, 2014, the second day of the hearing, which did not close until July 25, 2014. Thus, Respondent had ample time to call Goodloe as a witness, but did not. Crediting Ishmon's testimony, which is uncontradicted, I find that Goodloe did walk up as Ishmon was leaving and saw, or at least had the opportunity to see, Ishmon accepting a union card.

Ishmon further testified that after going back into the warehouse, he saw Operations Manager Bonner "standing in the break room, just staring at me. And at that time, I just went on back to my workstation, went to work." Bonner denied that she was in the breakroom and also denied that she stared at Ishmon.

The record does not establish that Ishmon engaged in any union or protected activity other than accepting the union card in the parking lot on May 16, 2013.

The next day, May 17, 2013, Ishmon was operating his reach truck in the warehouse when the events occurred which lead to his discharge. Here, I begin with Ishmon's testimony concerning what happened and then will turn to Respondent's evidence, which indicates that management did not believe Ishmon.

In the part of the warehouse where Ishmon was working, goods on pallets are stacked high, rising above what would be the ceiling height of a typical room. Ishmon's testimony does not suggest that any accident happened when he removed a pallet from the top of the stack:

> Q. Did anything unusual happen at work that day [May 16, 2013] or the following day?
> A. I think maybe the following, when I got to work. I usually go through my daily routine, start pulling down pallets. So as I pulled down a pallet off the top rack, I pulled the first pallet down, which they have double rack, so I pulled it down and—
> Q. Let me stop you. What's a double rack?
> A. A rack here and a rack behind it.
> Q. So the product is stacked and it's basically two deep?
> A. Yes, ma'am. So I pulled the first pallet down and I scanned it. As I scanned the pallet, my battery went dead.
> Q. A battery on what?
> A. My scan gun, my scan gun, it went dead.

From the record, I infer that a "scan gun," also called an "rf gun," reads a label or tag attached to the goods being moved so that a computer can keep track of the location of the goods. In Ishmon's version, he went on his reach truck to the office to get another battery. When he returned to the aisle he discovered that a pallet had "flipped over."

Thus, according to Ishmon, whatever happened took place during the time he was away from the aisle, getting another battery. If an accident occurred he didn't see it because he was not there. The implicit thrust of Ishmon's account is that he could not have been responsible for whatever happened because he was not present.

Ishmon's testimony leaves doubt as to what happened and does not acknowledge that there had been an accident resulting in damaged goods. He testified, in part, as follows:

> Q. Okay. And what did you observe?
> A. It was a pallet flipped over on the top rack.
> Q. When you say flip—that was in the area where you had just—
> A. Yes, ma'am.
> Q. —taken off the front pallet?
> A. Yes, ma'am.
> Q. And you say this pallet was flipped over. Was it completely upside down or was it—
> A. No, ma'am.
> Q. —tipped on its side?
> A. On its side.
> Q. And what did you do when you saw that?
> A. The first thing I did is went and got my lead, which is Dedrick Looney. And I came to him and I told him, I said, look, this pallet here is flipped over, but I did not flip this pallet over. He was like, well, okay, then, you're going to go through the chain of command. He went to get Margaret, which is the warehouse manager. And so they came around and they were discussing it. . .

Ishmon's exculpatory account—"I did not flip this pallet over"—differs from the conclusion managers reached when they saw the damage and investigated. That view will be discussed below, after summarizing Ishmon's narrative.

Goodloe directed Ishmon to go to the office of Operations Manager Bonner, where he took and passed a drug screen. Bonner also asked Ishmon to write out a statement of what

happened. His statement consisted of the following two sentences:

> The pallet was flipped over on the C level in G1 racks. I had get the Order Picker and go up and straighten the pallets out.

Bonner sent Ishmon home. He testified that later that same day he received a telephone call from a woman in the human resources department informing him that he had been discharged because he had failed to report the accident.

On direct examination, Ishmon denied receiving any disciplinary action before his discharge. He stated: "No, ma'am. I was actually a good worker." However, on cross examination, he admitted that his signature appeared on a previous disciplinary warning which he did not remember receiving:

> Q. You don't remember this at all. But you signed this, correct? A written warning dated August 29, 2012, describing a safety violation where you failed to secure the chocks applied to both sides of a trailer that's being unloaded. That's what the description of the offense is. Did that happen?
>
> A. No, I don't know anything about that.
>
> Q. I'm sorry?
>
> A. No, I don't know. I can't recall. I don't know anything about that.
>
> Q. Well, are you denying that's your signature?
>
> A. No, I'm not denying.
>
> Q. Well, the plan for improvement says that you were retrained on August 29, '12. Do you remember that?
>
> A. No.

Ishmon's failure to remember the warning notice he had signed raises some doubts about the reliability of his testimony. However, in this instance, the record does not present a testimonial conflict requiring resolution. Uncontradicted testimony establishes that managers decided to discharge Ishmon because they doubted his candor and concluded that he really had caused the accident.

Respondent had a contract with Yazaki to operate this particular warehouse, where automobile parts were stored. These goods included the Toyota parts which sustained damage in the event preceding Ishmon's discharge.

Operations Manager Bonner testified that on May 17, 2013, she received a telephone call from a Yazaki representative informing her that "there was some damage out in the warehouse and I needed to come out and see it." Bonner also quoted the representative as saying "that she caught Reginald speeding away from the scene of an accident and that she knew that he had done it."

Bonner went to the scene of the accident, where she photographed the damage and spoke with Ishmon. In the recent past, other accidents involving other workers had resulted in considerable expenses for Respondent. Bonner undertook a thorough investigation.

In addition to drug testing Ishmon and having him write a statement, Bonner mined the computer data, including that collected by the "rf gun" Ishmon had been using. Each of these devices has a unique number, so it was possible to ascertain which employees had come in recent contact with the goods, Toyota parts which had been damaged. The data revealed only one such person, Ishmon. Bonner testified, in part, as follows:

> Q. Were there—was there a second or third shift?
>
> A. Well, the second and third shift only did Nissan. So we did have a second and third, but they didn't pick any Toyota. They only did Nissan.
>
> Q. All right. So you concluded that it would not have been—it could not have been done on another shift?
>
> A. It could not have been done on another shift.
>
> Q. Because they don't do the kind of work he was doing that day?
>
> A. No. They do not.
>
> Q. Any other factors you took into account, in concluding that he had caused this damage?
>
> A. Well, the system pretty much told us everything we needed to know. We went back in to see if there had been any recent activity in the location, and he was the only person that had had any activity in that location.

By email, Bonner advised the human resources department of the results of her investigation. The May 17, 2013 email stated, in part:

> The sheet that indicates the locations that Reginald was pulling from is a clear indicator that he is the person that caused the damages. Per my conversation with the customer the damages to this product will cost $7,000; OHL will have to reimburse that amount of money back to the customer. So far this year, we are currently @ $12,000 in damages & this doesn't include the $22,000 worth of damages that was done last week by the temp. We haven't reached ½ of the year yet. Please let us know what action can be taken.

Human Resources Manager Lisa Johnson then contacted Bonner. Johnson credibly testified that she and Bonner discussed the investigation step by step:

> Q. What did she describe to you?
>
> A. She described that she had gotten a call from Ara who is our—who was the customer rep at Yazaki, and Ara had witnessed Reginald Ishmon coming out of a location. He was coming fast. He did not honk his horn or slow down. It had alerted her because that is not proper procedure, and so she went down, Ara herself went down that aisle. She found some pallets that were turned over, and that Ara had contacted Margaret and Margaret had gone to investigate out on the floor, and when she, Margaret, arrived, where Ara was standing at the location, Dietrick Looney, the lead was also there, and that Ara had told her that that was the product that she had found and Margaret had checked the, checked the pick ticket. There was a pick ticket on his reach lift, and his RF gun was on the reach lift, and she said that the location was the—the last person to touch it was Reginald Ishmon. She had an electronic trail that he had scanned product there and moved product there, and he had been the only one in that whole location.

Johnson decided to seek authorization to discharge Ishmon. Based on her credited testimony, I find that she did not know

about Ishmon's protected activity at the time she made this decision. Johnson sent an email to Senior Human Resources Manager Shannon Miles. It stated:

> Margaret [Bonner] had an employee fail to admit/report an overturned pallet today. She did drug screen him and we sent him home pending the investigation. The customer was near the location and saw the employee coming out of the location where the pallet was located. They did run reports that show he was the last one to move said pallet. $7k in damages added to their already high amount.
>
> Based on him not admitting or telling the accident occurred, may we proceed with termination?

Miles wrote back that "if the employee failed to report the accident/damage, etc., then proceed with termination." Johnson then telephoned Ishmon and told him he was discharged.

Ishmon maintains that he did report the accident to his leadman. However, Ishmon's own testimony does not establish that he reported that an *accident* had occurred. Rather, he told the leadman that "this pallet here is flipped over, but I did not flip this pallet over." Likewise, the brief statement he wrote at Bonner's request makes no reference to an accident. It merely stated that the "pallet was flipped over. . ."

The customer's representative had told Bonner she saw Ishmon speeding away. That observation adds significance to Ishmon's avoidance of the term "accident" and his insistence that he had not flipped the pallet over. In these circumstances, management would have reason to suspect Ishmon had caused the damage and was trying to distance himself from the scene and from responsibility.

Ishmon's claim that the pallet must have "flipped" after he left the area to get a battery naturally would raise the question of who else might have been responsible. Bonner's investigation, including her check of the computer records, indicated that no one else was around.

It is quite plausible that Bonner and Johnson, considering this information, concluded that Ishmon had caused the damage but would not acknowledge it. Although they explained the discharge decision as based on Ishmon's failure to *report* an accident, their reason more aptly could be described as failing to *admit* the accident. Johnson said as much during cross-examination:

> Q. So really this is about the fact that Margaret came to the conclusion and you apparently came to the same conclusion that he did it and he won't admit it. That's what this is about. It's not that he failed to report. It's that he wouldn't admit that he did it, correct?
>
> A. Yes.

Cross-examining Johnson, the General Counsel also asked questions challenging the thoroughness or sufficiency of the investigation. Here is an example:

> Q. So it took you 11 minutes, 11 minutes total, to determine that this guy is responsible for damaging the product?
>
> A. I don't think you understand how thorough Margaret Bonner is and how responsible she is. . .

Bonner's investigation, as described in her testimony and reflected in exhibits, did not appear to lack in thoroughness. It may be stressed, however, that the Act does not require an employer to conduct any particular sort of investigation before taking disciplinary action. Certainly, the quality or extent of a predischarge investigation has relevance because a perfunctory investigation may suggest that the employer is merely going through the motions to create a pretext. See, e.g., *Socied Espaiiola de Auxillio*, 342 NLRB 458 (2004). However, the Board does not sit in judgment of the "fairness" of the investigation in some abstract sense.

Bonner's investigation was sufficiently thorough that it does not suggest pretext. Further, nothing about the investigation indicates that the decision makers considered Ishmon's protected activities. To the contrary, the record persuades me that Respondent's decision-making process was uncontaminated by any consideration of Ishmon's protected activity. Moreover, based on the credited testimony of Johnson and Bonner, I find that they were unaware of Ishmon's protected activity at the time they decided to discharge him.

Notwithstanding those factual findings, at this point I will stop short of reaching the legal conclusion that protected activity was not a substantial or motivating factor in the decision to discharge him. Even if an employer did not consider a particular employee's protected activities, there are still ways, although uncommon, in which antiunion animus could motivate a decision to discharge an employee who had not engaged in protected activity. For example, an employer might attempt to make the discharge of a union activist appear legitimate by also discharging other employees as well.

The General Counsel does not argue that Respondent engaged in such conduct here and the record would not support such a finding. However, the General Counsel certainly is entitled to attempt to establish unlawful motivation in the manner the Board contemplated in *Wright Line*, above. The elements commonly required to support a showing that protected activity was a "substantial or motivating factor" are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. *Desert Toyota*, 345 NLRB 1335 (2005)

First, I will examine the issue of protected activity. As I understand the *Wright Line* analytical framework, it does not permit the judge to weigh the *magnitude* of the employee's protected activity but rather presents a binary question: Either the employee engaged in protected activity or he did not.

It certainly may be argued that the amount of an employee's protected activity—more precisely, the amount of the employee's protected activity known to management—would be relevant to the issue of whether such activity was a motivating factor in the employer's decision to discharge him. In other words, an employer harboring antiunion animus arguably would be more likely to take into account the protected activity of an employee who wore union attire and campaigned tirelessly for the union than that of an employee whose only known protected activity consisted of accepting a union card from someone in the parking lot. However, I do not believe the *Wright Line* framework allows me to consider the extent of

Ishmon's protected activity in determining whether the government has carried its initial burden, so I will not.

Certainly, Ishmon's accepting a union card constituted protected activity. Therefore, I find that the General Counsel has carried this part of the government's initial burden.

Next, I focus on whether the Respondent knew about this protected activity. Ishmon's uncontradicted and credited testimony that, as he left, he saw Operations Supervisor Goodloe approach, constitutes some evidence that Respondent knew about the protected activity. Goodloe did not testify and thus Ishmon's testimony is uncontradicted. The record indicates that Ishmon's work brought him into contact with Supervisor Goodloe, so I will presume that Goodloe recognized that the person accepting the union card was Ishmon.

There is another problem. Even assuming that Goodloe recognized Ishmon and saw him accept a union card, the record does not establish that this knowledge ever reached the managers who actually made the decision to discharge Ishmon. Based on the credited testimony of Johnson and Bonner, I have found that they were unaware of this protected activity.

However, Board precedent does not require direct evidence that the manager who took an adverse employment action personally knew about the employee's protected activity. See, e.g., *Vision of Elk River, Inc.*, 359 NLRB 69 (2012). Moreover the Board has held that a lower level manager's knowledge of an employee's union activities can be imputed to those higher in the chain of command. See, e.g., *Flex-N-Gate Texas*, 358 NLRB 622 (2012).

In view of this precedent, and notwithstanding my finding that Johnson and Bonner did not, in fact, know about Ishmon's accepting the union card, I will assume for the purposes of the *Wright Line* analysis that the General Counsel has established the second initial requirement.

In making this finding, I rely only on Goodloe's presence in the area where Ishmon received the union card. I do not consider whether or not Manager Bonner was inside the building, in the breakroom, and saw Ishmon on his way back to work. Even if she were there and had seen him, it would only establish that he had been outside during the break, not that he had accepted a union card.

Based on the Board's prior recent cases involving this Respondent, I also conclude that the General Counsel has established the third initial requirement, antiunion animus. Because the General Counsel has satisfied all three initial requirements, the burden of proceeding shifts to the Respondent to show that it would have discharged Ishmon even in the absence of protected activity. Further, I conclude that Respondent has carried this burden.

Less than two months before Ishmon's discharge, Respondent had terminated the employment of another operator, Wanda Dillard, for similar reasons. The notice documenting her discharge indicated that she had been involved in an accident while operating a forklift but had not admitted her involvement. The notice states, in part, as follows:

> Wanda did not report the damage to her forklift *as an accident*. However, the investigation by Steve Holman, supervisor for MHR, determined that the only way the damage could have been caused was through direct impact with an overhead beam. [Italics added]

The Respondent discharged Dillard not merely for the accident but, more fundamentally, for failing to report that an accident had occurred and failure to admit involvement in it. Thus, Respondent discharged both Willard and Ishmon for the same reason, lack of candor.

The General Counsel argues that Ishmon's case is different because Respondent had no direct evidence that Ishmon had caused the accident and did not, in the General Counsel's opinion, conduct sufficient investigation to reach that conclusion. Thus, the government contends that the investigation was so perfunctory that it reveals a pretextual motive.

However, even though Bonner performed the investigation quickly, that fact alone does not establish that it was a ruse to conceal an ulterior motive. Notwithstanding the speed of the investigation, it appears to have been thorough enough to support a conclusion that Ishmon had caused the accident but was refusing to admit it. It bears repeating that the Board does not sit in judgment concerning the quality of a predischarge investigation except to determine whether the investigation was a bonafide effort to obtain facts rather than a charade to mask an unlawful motive. The present record does not suggest that Bonner's investigation of the Ishmon matter was merely a pretext and I conclude that it was not.

As to the General Counsel's argument that the Ishmon matter is distinguishable because there was no direct evidence that Ishmon had been involved in the accident, I note that in the Dillard discharge, the Respondent also based its conclusion on an investigation. The discharge notice states that the investigator "determined that the only way the damage could have been caused" was through a direct impact which would be characteristic of a collision which Dillard would not admit. Thus, in the Dillard case, the Respondent rested its decision not on video recording or eyewitness report but on the opinion reached by the investigator.

The Respondent also presented evidence that it had treated other employees in a manner similar to its treatment of Ishmon, but I believe that the Dillard case is especially probative both because of the similarity of facts and also because it occurred not long before the Respondent discharged Ishmon. In sum, I find that the Respondent has carried its burden of showing that it would have discharged Ishmon even if he had not engaged in protected activity.

Therefore, I recommend that the Board dismiss the unfair labor practice allegations related to complaint paragraph 13(e).

Complaint Paragraph 13(f)

Complaint paragraph 13(f) alleges that about May 22, 2013, Respondent discharged its employee Deangelo Walker. Respondent admits this allegation, but it denies that it discharged Walker because he assisted the Union and engaged in concerted activities and to discourage other employees from engaging in such activities, as alleged in complaint paragraph 13(o). Respondent also denies that the discharge of Walker violated Section 8(a)(1) and (3) of the Act, as alleged in complaint paragraph 20.

Walker, employed by a temporary service, performed work for Respondent for 8 or 9 months. Then, in April 2013, Respondent hired him. Respondent requires all new employees to complete successfully a 90-day probationary period. However, Respondent terminated Walker's employment on May 21, 2013.

The General Counsel contends that Walker engaged in activity protected by the Act on two occasions. According to Walker, about a week before his discharge, while he was in the parking lot outside the warehouse, he signed a union authorization card given to him by Nannette French. Walker further testified that Operations Manager Margaret Bonner saw him as he signed the card:

> Q. BY Ms. MOHNS:
> So you tell me you received the card from her?
> A. Yeah. I got the card from Ms. French. And as I got it from her, I started to sign it And while I was signing it, Ms. Bonner, she was on her way out the building, headed to her truck, I believe on lunch break. She saw me getting the card from Ms. French and signing it And I didn't pay it any mind or anything.
> Q. How did you sign the card? Were you sitting in a car, when you were signing that?
> A. We were standing outside the car.

Bonner denied both seeing and making eye contact with Walker. Moreover, although French testified, she did not mention either giving a union card to Walker or the incident he described. The differences in testimony raise a credibility issue which will be addressed later, after discussing the second instance of protected activity alleged by the General Counsel.

Walker testified that on about May 17, 2013, he attended an employee meeting at which Bonner spoke. At that meeting, another employee asked Bonner why some new employees were receiving a higher wage rate for performing similar work. Walker did not speak at this meeting, but, he testified, voiced his concerns to Bonner afterwards:

> Q. What happened after the meeting?
> A. After the meeting, I pulled Ms. Bonner to the side, myself, and I spoke with her, myself.
> Q. Where was this conversation?
> A. It was in the hallway, outside of the conference room.
> Q. Were there other employees still in the area?
> A. No.
> Q. It was you and Ms. Bonner?
> A. Yes, ma'am. I wanted to speak with her one-on-one, basically. And I asked, you know, I told Ms. Bonner, I was like, well, you know, basically I'm referring back to what was said in the meeting, it's not fair to us as employees who have been working here to be getting paid these wages, you know, and these people that's just coming doing the same job. You know, I just told her, you know, it's really not fair. And she looked at me and she said, so, well, what do you—you're not going to do your job now? I told her, no, I'm going to continue to do my job. And I looked at her and I told her this is really one of the reasons why we need the Union. After I said that, you know, she kind of looked at me strange. And she didn't say anything. She looked at me and walked off.
> Q. You say she looked at you strange Could you describe?
> A. I would say she looked pretty upset about it, about my comment that I made. She looked pretty upset about it.

Bonner's testimony contradicts Walker's. She stated that Walker did approach her after the meeting, but she did not have time to meet with him then and said they would have to talk the next day:

> Q. All right. After this meeting with the group, did DeAngelo Walker speak to you privately?
> A. He wanted to talk, but I actually came back to work that night. I had a meeting that night, and I had brought my son with me, and I told him that we would have to talk tomorrow.
> Q. Okay. Well, in that—so that—after that meeting that night, did he pull you aside and say that it's not fair that the new people were making more money? And you—and did he say that he told you this is really one of the reasons why they needed a union?
> A. No, he did not.
> Q. Did he ever make that comment to you at any time
> A. He did not.
> Q. —that this is why we need a union?
> A. No, he did not.
> Q. In any conversation you had with Mr. Walker, did you ask him if he was going to not do his job?
> A. No, I didn't.

During cross-examination, Bonner further testified that the day after the meeting, Walker did come to her office. Walker raised the same issue—the pay rate of the newly hired employees—which the other employee had brought up at the meeting. Bonner testified that Walker told her he had gone online to the Respondent's website and saw "what the job paid."

Bonner asked Walker to come over to her laptop computer and show her where on the Respondent's website Walker had seen the pay rate information. On the computer, she called up the Respondent's website and asked Walker where he had gone from there. According to Bonner, Walker replied that he could not remember.

She clicked on the "Careers" page and asked Walker "where did you go from here." Bonner testified that Walker said he really did not remember, but added that he would go home and look for it and then get back to her. However, according to Bonner, Walker never did.

Thus, the testimony of Bonner and Walker conflicts. For reasons discussed above in connection with complaint paragraphs 9(c) and (d), I credited Bonner rather than Walker to resolve another testimonial conflict. In that instance, I concluded that Bonner likely had a more accurate recollection of her own words but that conclusion was specific to the specific facts which are not present here. Therefore, the fact that I considered Bonner's testimony more reliable at one point is not dispositive of whether it should be credited here.

No other witnesses were present in either Walker's version or Bonner's of their private conversation so neither account is corroborated. Accordingly, I return to the evidence regarding what happened earlier, in the parking lot, and first note this further testimony of Walker describing Bonner's appearance while Walker was talking with French:

> She was leaving, headed to her car on lunch break. She normally leaves for the lunch break and she's headed to her car. She seen me over there talking to Nannette. I looked at her and she looked at me. She got in her car and, you know, like I said, Nannette was on her break and I was just getting to work, so we was sort of like in the parking lot, mingling, you know. She got in her truck and she drove off. We caught eyes, looked at each other.

The fact that Walker said that Bonner "normally" leaves for the lunch break suggests that he had noticed her leaving for lunch on more than one occasion, but his testimony referred to Bonner's vehicle as both a car and a truck. Although this discrepancy might call into question his observations, I give it little weight because Bonner testified that she drove a Yukon, a sports utility vehicle which does bear some resemblance to a truck.

However, I give more weight to the fact that Nannette French's testimony did not mention Walker or the incident he described in the parking lot. This absence of corroboration, when it should be expected, does decrease my confidence in Walker's version of the facts.

Moreover, Bonner testified in considerable detail. It seems unlikely that she would simply make up a story that she had her son with her and therefore did not have time to meet with Walker right then, after the employee meeting. Although it is conceivable that a witness might fabricate such a nonessential detail, it seems particularly unlikely in the case of Bonner, who appeared to be too meticulous to be comfortable telling an unnecessary and untidy lie.

My conclusion that Bonner accurately testified about the date and circumstances of her one-on-one meeting with Walker raises serious doubts about the reliability of Walker's testimony. When and where a meeting took place are not incidental matters likely to be overlooked or remembered incorrectly. To these doubts must be added French's failure to corroborate Walker's testimony about what happened in the parking lot. Therefore, I conclude that Walker's testimony is not as reliable as Bonner's and resolve testimonial conflicts by crediting the latter.

Respondent has a rule stating that the "usage and/or presence of cell phones on the warehouse floor are strictly PROHIBITED." (Capitalization as in original.) Walker signed a copy of this rule on April 24, 2013.

On May 21, 2013, after the start of the 2 o'clock shift which Walker worked, Bonner saw him on the warehouse floor talking on a cell phone. For the reasons discussed above, I credit her testimony, which includes the following, about this occurrence:

> Q. Okay. All right. Then tell us what you saw.
>
> A. I had walked out on the floor, and I observed DeAngelo on a cell phone when I walked out. And as I walked around to the—we had a yellow barrier that—from the floor to the warehouse. And I was standing on the rail and I watched him talking on the phone. He was pacing back and forth on his cell phone.
>
> Q. Okay. And where was he when he was pacing back and forth?
>
> A. On the barrier, just walking back and forth, pacing on the floor.
>
> Q. Okay. And was anyone with you at the time?
>
> A. Steve Hogan, the MHR technician.
>
> Q. All right. Could you tell if Mr. Walker was—saw you, or was looking at you while he was walking back and forth, talking on the phone?
>
> A. I'm sure he saw me.
>
> Q. Okay. Did you make eye contact with him?
>
> A. We did, at one point.
>
> Q. Okay. Did he hang up after he saw you looking at him?
>
> A. No, he did not.

Walker does not deny that he was talking on the cellphone, but his testimony conflicts with Bonner's concerning where he was standing. Both Walker and Bonner placed marks on a diagram of the warehouse to show Walker's location as he spoke on his cellphone.

Bonner's testimony refers to a Steve "Hogan" in the portion quoted above but the name "Holman" appears at other places in the transcript and I conclude that both "Holman" and "Hogan" refer to this same person, Stephen Holman, who testified as a witness for Respondent. Rather than helping to resolve the issue of which witness to credit, however, Holman's testimony adds another complication.

Holman testified that he saw someone, later identified as Walker, talking on a cellphone, but it was not after the 2 o'clock shift started. Holman testified that this event took place in the morning, and he seemed quite certain about it:

> Q. You saw him at the clock?
>
> A. Yeah, I saw him when he clocked in.
>
> Q. Was this around 2 o'clock in the afternoon or thereabout?
>
> A. No, it was a lot earlier. It was 8 o'clock, somewhere like that. It was early in the morning.
>
> Q. You don't recall it being in the afternoon?
>
> A. No, no. It was early in the morning. It was early in the morning, because I started at 7. And it was early, it's an early stop. That was usually my first stop in the daytime. And that's where he did that.

This testimony, that he saw the person later identified as Walker around 8 a.m., conflicts with other evidence. Walker testified that he clocked in shortly before the beginning of the 2 o'clock shift. An email from Bonner to human resources managers indicates that Walker clocked in at 1:54 p.m., which essentially is in agreement with Walker's testimony.

Notwithstanding some similarities in the testimony of Holman and Walker, I conclude that Holman's should receive little weight. In addition to the matter of when Holman witnessed the event, it also concerns me that he did not learn until later that the man with the cellphone was Walker. Because of the

chance that Holman misidentified the man he saw as Walker, I will not rely on his testimony to establish what happened.

Instead, crediting Bonner's testimony for the reasons discussed earlier, I find that Walker was not standing in the break area but the work area of the warehouse. Additionally, based on Bonner's testimony, I find that she saw Walker talking on his cellphone after the 2 p.m. starting time.

Walker's testimony indicates that his telephone call ended approximately at the 2 p.m. starting time rather than extending into work time. However, Walker did not deny that he already had clocked in before the call began:

> Q. Do you recall approximately when you clocked in that morning or that afternoon, excuse me?
> A. About five minutes till.
> Q. And what did you do after you clocked in?
> A. After I clocked in, I headed back towards the break area to put away my personal items, my food and stuff, you know, after sitting there drinking a pop, throw away my trash, clean up after myself. On the way out the door, I received a phone call from my mother. I took the phone call. I probably was on the phone maybe five minutes.

Bonner had a supervisor check the timekeeping system to determine at what time Walker had clocked in, and then sent an email to Human Resources Managers Lisa Johnson and Sara Wright. That email stated:

> Deangelo Walker is on 2nd shift in Receiving. His shift starts @ 2 pm. He clocked in @ 1:54 pm today, but I walked out on the floor @ 2:04pm & noticed Deangelo walking on his cell phone. He saw me, but continued to talk on his phone out of his assigned work area. I proceeded to talk to Steve Holman (maintenance man) & I asked did he see what I saw. Steve stated that he was on the phone a few minutes before I even walked out on the floor. I then called Mark Kuhl so that he could look in Kronos for me to see what time he clocked in or was he even on the clock. Deangelo was not on break & he is currently on his 90 day probation. Please advise as to what action can be taken.

After receiving the email, Human Resources Manager Johnson checked with her superior, Senior Employee Relations Manager Miles, and they decided to discharge Walker. Both Johnson and Miles testified that they had not been told that Walker signed a union card and did not know that he had engaged in any union activities.

Johnson informed Walker of his discharge at a meeting also attended by Bonner and two supervisors, Mark Kuhl and Antonio Goodloe. Johnson described Walker's reaction when told he was being discharged:

> Q. So during the meeting, tell me what you recall?
> A. He got angry and he said he couldn't believe this shit, and he said isn't there something else we can do, and I said no, the decision had already been made to terminate you. I'm sorry. You violated our policy. We'll need your badge. He stood up and started yanking stuff off and throwing it.
> Q. When you say yanking stuff off and throwing it, what are you referring to?
> A. Well, he had an ID badge which had his ID badge and his time card and his forklift license. He yanked that off and threw that towards Margaret, went across her desk, and then Yazaki had to wear an orange reflective vest. Our associates wear those out on the floor, and he took that off and threw that at us. So I asked Mr. Kuhl and Mr. Goodloe to escort him out the door.

Walker admitted that he "grew upset. I told her, hey, this is a bunch of bullshit. I really did. I got real upset. And I told her this is a bunch of bullshit." Walker also volunteered that as Supervisor Kuhl escorted him out the door, Kuhl made a comment which prompted Walker to tell him "to shut the hell up talking to me."

In analyzing whether Walker's discharge violated the Act, I will follow the *Wright Line* framework. As discussed above, the General Counsel must first establish that union or protected activity was a substantial or motivating factor in the decision to discharge Walker. The government may carry this burden by proving union or other protected activity on the part of employees, employer knowledge of that activity and antiunion animus. If the General Counsel establishes all of these elements, then the burden of proceeding shifts to Respondent to establish that it would have taken the same action even in the absence of protected activity.

Because I do not credit Walker's testimony, I conclude that the General Counsel has not proven either that he received a union card from employee French or that he signed one. Further, I find that Bonner did not see Walker signing a union card.

Additionally, I do not credit Walker's testimony concerning his meeting with Bonner. Therefore, I find that he did not make any statement to Bonner about employees needing a Union.

However, according to Bonner, whose testimony I credit, Walker did come to her office and tell her that he saw on the Respondent's website what Respondent paid employees. She asked him to show her where on the website he found that information and he could not recall. Arguably, Walker may have been engaged in protected activity even though he was by himself when he made the statements and even though he did not mention the Union.

The Board has consistently defined concerted activity as encompassing the lone employee who is acting for or on behalf of other workers, or one who has discussed the matter with fellow workers, or one who is acting alone to initiate group action, such as bringing group complaints to management's attention. *Kvaerner Philadelphia Shipyard*, 346 NLRB No. 36 (2006) (not reported in Board volumes), citing *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Meyers Industries (II)*, 281 NLRB 882 (1986); *Globe Security Systems*, 301 NLRB 1219 (1991); *Alaska Pulp Corp.*, 296 NLRB 1260 (1989), enfd. 944 F.2d 909 (9th Cir. 1991).

When Walker made the statement to Bonner that he found "what the job paid" on Respondent's website, was he "acting for or on behalf of other workers" such that his statement constituted protected activity? The words that he "knew what the job paid" do not, in themselves, suggest that he was speaking on behalf of other employees. However, the statement can only

be understood as a continuation of the discussion during the meeting, at which other employees brought up the subject of a new employee's pay.

In the discussion above concerning complaint paragraph 9(c), I concluded that at this meeting, Bonner violated Section 8(a)(1) of the Act by telling employees, in effect, that if they were unhappy they could quit and find other work. Clearly, she made this remark in response to an employee-initiated discussion about wages which clearly constituted protected activity. Bonner's statement reasonably could be understood as being dismissive of employees' concerns, so Walker's appearance at her office the next day, raising the same matter, signaled that the employees' wage concerns could not be dismissed so easily.

Additionally, at this same meeting, Bonner signaled her disapproval of employees discussing their wages with each other. As noted above, the complaint did not allege this statement as violative. However, her words have relevance here in determining whether Walker was engaged in protected activity.

When Walker told Bonner that he found "what the job paid" on Respondent's website, it reasonably communicated that it wasn't even necessary for employees to discuss their wage rates because such information was available online. In other words, Walker clearly was trying to continue the discussion which employees began at the meeting the previous day. Therefore, I conclude that Walker was engaged in protected activity.

The General Counsel therefore has established the first of the initial *Wright Line* elements and the second as well because Walker engaged in the protected activity in the presence of Bonner, one of Respondent's managers.

The General Counsel also has satisfied the third initial requirement. Bonner's suggestion to employees that they could quit if unhappy, a violation of Section 8(a)(1), precedes Walker's discharge by less than a week. Additionally, the Board has found animus in previous recent cases.

Because the government has carried its initial burden of showing that protected activity was a significant or motivating factor, the burden of proceeding shifts to the Respondent to prove, as an affirmative defense, that the presence of an unlawful motivation during the decision-making process did not change its outcome. See *North Fork Services Joint Venture*, 346 NLRB 1025 (2006), citing *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

In *Lampi LLC*, 327 NLRB 222 (1998), the Board stated that in assessing whether a respondent has established this defense, "we do not rely on our views of what conduct should merit discharge. Rather we look to the Respondent's own documentation regarding [the alleged discriminatee's] conduct, to its "Personnel Policy" handbook, and to the evidence of how it treated other employees with recorded incidents of discipline." 327 NLRB at 222–223.

For reasons discussed above, I have found that Walker did, in fact, violate the Respondent's written cellphone policy, which stated that "usage and/or presence of cell phones on the warehouse floor are strictly PROHIBITED." Respondent's capitalization of "prohibited" suggests that it intended to make clear to employees their duty to obey the policy. There is no doubt that Walker received a copy of this policy because his signature appears on a copy dated April 24, 2013, less than a month before he was discharged for violating it.

As a new employee, Walker was about one-third of the way through a 90-day probationary period, normally a time of heightened scrutiny of an employee's work. All of these factors—Walker's violation of a policy the Respondent considered important, after he had received a copy of it and during his probationary period—suggest that the Respondent would have taken the same action in any event.

Walker testified that he had seen two other employees, Lawrence Leland and Rodney Davis, using cellphones without apparent consequences. Bonner testified that she had not seen either Leland or Davis violate the Respondent's cellphone policy. Crediting Bonner, I do not find that Respondent treated either Leland or Davis disparately. To establish disparate treatment requires proof that management knew about a violation but failed to impose the same degree of discipline.

Walker testified that "she's caught Rodney [Davis] on his cellphone before," presumably referring to Bonner. However, he then added "Rodney, you know, he was in the office. And he had his phone out, using his phone." However Respondent discharged Walker for violating a policy prohibiting use of a cellphone *on the warehouse floor*, not in the office.

Additionally, although Walker claimed that Bonner saw another employee, Leland, using a cellphone, it is not entirely clear from his testimony that Leland was on the warehouse floor at the time. In any event, crediting Bonner's testimony rather than Walker's, I find that she did not see either Davis or Leland violating the cellphone policy which Walker violated.

Walker also claimed that a leadman, Dedrick Looney, used a cellphone on the warehouse floor. Bonner credibly testified that Respondent had authorized the leadman to do so because he needed it to perform his job duties.

In sum, the credited evidence does not support a finding of disparate application of the cellphone policy.

In evaluating rebuttal evidence, the Board also looks to instances when other employees have been disciplined for similar violations. The record does not disclose instances of similar violations. However, the Respondent not only provides employees with copies of this policy but also has posted a sign prohibiting cellphones at the warehouse entrance. Considering how much attention Respondent calls to this policy, I conclude that violations of it are rather infrequent.

Particularly in view of Walker's status as a probationary employee, and considering that he violated a policy Respondent emphasizes, I conclude that Respondent has carried its burden of proving that it would have discharged him even in the absence of protected activity. Therefore, I recommend that the Board dismiss the allegations arising from complaint paragraph 13(f).

Complaint Paragraph 13(g)

Complaint paragraph 13(g) alleges that about May 23, 2013,

Respondent discharged its employee Nannette French. Respondent admits this allegation but denies that it terminated French's employment because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 13(o). It also denies that the discharge of French violated Section 8(a)(3) and (1) of the Act, as alleged in complaint paragraph 20.

French began work from Respondent as a fulltime employee on July 12, 2010, and worked at the Yazaki warehouse at 5050 Holmes Road in Memphis until her discharge on May 23, 2013. The General Counsel's brief stated, in part, that "French did not get involved in the Union organizing campaign at Respondent's facilities until about May 14, 2013, immediately after the ballot count." After that ballot count, French began passing out union cards to other employees.

Additionally, the General Counsel's brief states that on May 14, 2013, Operations Supervisor Antonio Goodloe saw French in the Yazaki warehouse parking lot speaking with employee Whitley, saw her signing a union card, and taking union materials from Whitley to distribute to other employees. On that same day, the General Counsel argues, Operations Manager Bonner saw French distributing union cards, which Bonner denied.

For reasons discussed above, I have concluded that Bonner's testimony was more reliable than French's and have credited Bonner's denial that she saw French distributing union cards. Further, for the reasons discussed above, and especially because of my concerns about French's testimony, I have concluded that credible evidence did not establish that Goodloe saw French when she was passing out union cards.

On May 17, 2013, the Respondent discharged French after she returned from lunch a minute late, thereby accumulating a 13th point under the Respondent's written attendance policy, which provides that "Thirteen combined points, or two no call/no show occurrences within a 52-week rolling period, will result in termination."[6] French had received a copy of this policy, and had signed a receipt for it, on November 2, 2012.

The General Counsel does not contest that French had accumulated the 13 attendance points and I find that she had. Rather, French's testimony largely focused on a malfunction in the door French tried to use to enter the warehouse after lunch on May 17. To unlock the door, an employee would an identification badge or card in front of a sensor, but the door had a history of malfunctioning. French claimed that the door was not working properly which resulted in her being a minute late.

Manager Bonner credibly testified that she had posted a sign instructing employees to use another door in case this one malfunctioned. French denied that there was such a sign but, for reasons discussed above, I do not believe French's testimony to be as reliable as Bonner's and, crediting Bonner, I find that a sign had been posted.

However, it should be stressed that a number of factors affect observation and memory, and therefore the reliability of testimony, so my decision not to credit French's testimony does not reflect at all on her efforts to be truthful. Moreover, a decision not to credit one portion of a witness's testimony neither compels a conclusion that the remainder is unreliable nor relieves the judge from the need to keep checking.

Another part of French's testimony warrants discussion. After clocking in a minute late on May 17, 2013, French did not tell any supervisor that the door had malfunctioned but instead went to her work area. She gave the following explanation:

> Q. And why didn't you go tell Antonio or another supervisor what had happened?
>
> A. Because the door had been broke. Everybody know that. So I never had to tell anybody that we clocked in a minute late or a minute early. And then with me, I'm never late. I'm never late. I'm on the—I'm on the parking lot 30 minutes before time, in the morning. I'm never late.

Later in her testimony, French made a similar statement:

> Q. Do you remember what the separation said?
>
> A. I think what they said what they fired me for, but they put on there, I think, regulation, or rules, or something. She had told me it was a minute late for lunch, for clocking in a minute late from my lunch break and I had pointed out. But we never got points for lunch, being late on lunch. And I'd never been late before, so I just didn't understand.

At first glance, French's "never been late" claim might seem improbable in view of her 12 previous attendance points, but Respondent's records actually support it. The Respondent's attendance policy assesses a 1 point penalty for being late, 2 points for an unexcused absence, 3 points for leaving early, and 4 points for no call/no show. French's termination notice indicates she received points as follows:

Date	Points		Date	Points
8-15-12	2		2-5-13	2
9-10-12	2		3-2-13	4
10-9-12	2		5-17-13	1

Thus, the termination notice indicates that French had four unexcused absences, one no call/no show and only once, on her last day of employment, was she assessed a point for being late. Her statement that she had never been late before therefore is consistent with the documentary evidence.

However, I still hesitate to accord significant weight to French's testimony that the employees never got points for returning late from lunch. The record does not establish that French had, or was in a position to have had personal knowledge of how Respondent generally enforced its attendance policy.

The General Counsel argues that disparate enforcement of Respondent's attendance policy supports a finding of animus. In principle, a comparison of the computerized time records with disciplinary records could reveal Respondent's consistency or inconsistency in assessing points for tardiness. Such rec-

[6] Complaint paras. 11(a), (b), and (c) alleged that Respondent had committed a *Weingarten* violation in connection with French's discharge interview, but, for the reasons discussed above, I concluded that the credited evidence failed to establish such a violation.

ords should allow the government to prove any pattern of employees clocking in late but receiving no points, if such a pattern existed. However, the documents in evidence do not reveal such a pattern and I must conclude that the evidence presented does not establish disparate enforcement.

In any event, the record includes enough other evidence of animus to carry the government's initial burden on this element of the *Wright Line* analysis. However, no credited evidence establishes that Respondent knew that French had engaged in protected activities. Therefore, I conclude that the General Counsel has not proven that protected activity was a substantial or motivating factor in the decision to discharge French.

Accordingly, Respondent has no rebuttal burden. I recommend that the Board dismiss the allegations related to complaint paragraph 13(g).

Complaint Paragraph 13(h)

Complaint paragraph 13(h) alleges that about June 25, 2013, Respondent discharged its employee Stacey Williams. Respondent admits this allegation. However, Respondent denies that it discharged Williams because he assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 13(o). Respondent also denies the legal conclusion that its discharge of Williams violated Section 8(a)(3) and (1) of the Act.

On June 17, 2013, Operations Manager David Maxey saw Stacey Williams, an operations lead employee, kissing another employee, Luz Balderrama. From his position, about 100 feet away, Maxey thought that Williams had kissed Balderrama on the lips, but later learned from Balderrama that it had only been on the cheek.

At Maxey's request, Human Resources Manager Sara Wright came to Maxey's office for an interview with Williams. Maxey first discussed some matters related to Williams' job duties and then brought up the kiss.

From this point on, two starkly different and irreconcilable accounts emerge from conflicting testimony. Both versions cannot be correct, and crediting the wrong one would work an injustice by attributing improper conduct to a person or persons innocent of it. However, in this instance, the various credibility factors do not point in one direction, leaving room to doubt whichever choice prevails.

The accounts differ not only on points of obvious relevance, but also on incidental matters, that is, on points which would have no obvious effect on the outcome and about which a witness would have little motivation to stretch the truth. For example, the testimony of both Maxey and Wright suggests that Maxey felt somewhat uncomfortable bringing up the issue of the kiss and therefore Wright, sensing Maxey's hesitation, became more active in the conversation. In contrast, William's testimony indicates that Wright said little:

> Q. Okay. So tell me what happened in that meeting. Was there anybody else present?
>
> A. Just those two.
>
> Q. Okay.
>
> A. David said, I saw you kiss Luz in the mouth. And I said no—I said, no, that's a lie. I said, that's not true. And I said, let me go—I said, let me—I said, hold on, let me go get her.
>
> Q. Did Ms. Wright say anything? Tell me everything you recall about that conversation.
>
> A. No, she was—actually, she was listening to what David was saying, I think, at that particular time. I don't remember her saying anything.

Williams' own testimony thus reveals that he was angry, but the Respondent's witnesses depict him as more agitated than his own testimony suggests. Wright and Maxey testified that Williams left the office without asking permission or receiving permission. Williams' testimony, quoted above, indicates a kind of implied request when he said "hold on, let me go get her." Considering the testimony of all three witnesses, I believe it likely that Williams did say "let me go get her" and, hearing no response countermanding that statement, left the office to do it.

Maxey's office is on a kind of mezzanine above the warehouse floor. Williams stood at the top of the steps and called to Balderrama, asking her to come up. According to Williams, as she came up the stairs he went down them and returned to his work station. However, Maxey and Wright contradict him.

The two managers testified that Williams returned to the office along with Balderrama and that Wright asked Balderrama to wait outside while they finished their discussion with Williams. In their version, Williams came back into Maxey's office and Wright shut the door, leaving Balderrama on the outside.

Balderrama's testimony does not resolve this conflict. She did not mention Williams calling to her but instead testified that Manager Maxey came to her and asked her to come into his office. Her testimony does not resolve whether Wright asked her to stay outside because Balderrama did not remember Wright being there:

> Q. Was anybody else there?
>
> A. I can't remember.
>
> Q. You don't remember whether there was Sara Wright there or somebody else?
>
> A. I don't want to tell you because I can't remember. I can't remember who in there.

If events unfolded as described by Maxey and Wright, they would have been dramatic enough to make a lasting impression. Wright testified that after she closed the office door, Williams asked her, "Are you blocking me in? Are you blocking that door? Kind of in a threatening manner. . ."

Maxey's testimony generally corroborates Wright's. In their version, Balderrama—whom Wright called "Cici"—was standing outside Maxey's office door while Maxey, Wright and Williams were inside. Wright's further testimony depicts Williams as uncharacteristically angry and, in fact, nearly out of control:

> Q. Okay. All right. So he was asking you if you were blocking the door, and then what did, what did you do?
>
> A. I was nervous. I was scared because he's normally a pretty soft-spoken guy and he was raising his voice at me, he was looking down on me, and I just got out of the

way. I'm like--I felt physically threatened, and I was like, I'm just going to back up.

Q. All right. You mentioned he was normally a soft-spoken guy. So you had had conversations with him before?

A. Yes.

Q. Okay. And this was not his normal speaking voice?

A. I don't think so, no.

Q. Okay. So what happened after you stepped, after you stepped aside? Was there any further conversation at that time?

A. He again stormed out.

Q. Okay. He left the office again?

A. Yes.

Q. All right. Did he ask to leave?

A. No.

Q. Did you give him permission to leave?

A. No.

Q. Okay. Then did you talk to Cici?

A. Yes.

Q. All right. And she came into the office?

A. Yes.

If events took place as Wright testified, Balderrama would have been standing outside the office door and therefore would have seen Williams when he "stormed out." It seems unlikely that she would forget an event this dramatic. That Balderrama recalled no such occurrence raises doubts about the reliability of the narrative offered by Wright and Maxey.

Yet her testimony does not support Williams' version, either, because Williams testified that he called to Balderrama and asked her to come to the office. By comparison, Balderrama testified that Maxey came to get her. Rather than providing a basis for resolving the conflicting stories, Balderrama's testimony adds still another version.

According to Wright and Maxey, they learned from Balderrama that Williams had not kissed her on the mouth but on the cheek. They further testified that after Balderrama left, they went to Williams' work station and brought him back to Maxey's office. Williams' testimony makes no mention of such a meeting.

The testimony of Wright and Maxey depicts Williams as being hostile and uncooperative at this second meeting. According to both Wright and Maxey, at one point during this meeting Williams held up his hand in a gesture which Maxey described as "talk to the hand." Maxey testified that Wright "said, please don't address me in that manner. And, well, of course, he immediately lowered his hand."

Wright's testimony generally corroborates Maxey's. Although Wright did not use the phrase "talk to the hand," she did testify that when Williams held up his hand she told him not to act that way and he put his hand down.

Thus, both Maxey and Wright attribute to Williams a hand gesture they considered offensive. According to the online *Urban Dictionary*, "talk to the hand" is a phrase used to ignore and disregard a comment: "When this phrase is used, it is customary to raise your hand, palm facing out, and place it almost touching your adversary's face. This can make even the most civil person raging mad."[7]

Wright decided that Williams should receive a written warning. However, this "final warning," dated June 20, 2013, does not mention this "talk to the hand" gesture. The warning makes no specific reference to this meeting which, according to Williams' testimony, did not occur. The stated basis for the discipline is the way in which, according to Wright and Maxey, Williams acted in the previous meetings:

While being addressed, Stacey stormed out of the office twice. He was unprofessional, responded in a hostile and aggressive manner and repeatedly interrupted and spoke over both David and Sara. At one point, while Sara was standing in the office doorway, Stacey repeatedly, loudly and in a hostile manner asked, "Are you blocking me in?" When Sara told him "No, we just want to talk to you. Due to his aggressive nature and fear of what he might do given his demeanor at the time, Sara stepped out of the way and Stacey stormed out. This type of behavior is unacceptable and will not be tolerated.

If Wright and Maxey had, in fact, met with Williams later in the day, and if he had, in fact, made the offensive hand gesture, the written warning likely would have mentioned it. The hand gesture would have offended not merely in an abstract way but also because it would have signaled Williams' continuing and persistent refusal to accept the instruction the managers were giving him, that he should not kiss other employees. Wright's testimony indicates that Williams continued to refuse to accept the message:

Q. Okay. Did you ask him if he understood what you were telling him about the hugging and kissing?

A. Yes.

Q. What did he say?

A. He said, he said no.

Q. He said no. So did you ask him again if he understood?

A. I asked him what do I need to clarify? Do you understand that we're telling you from this point forward this is what we expect? He said no. I said what don't you understand? He said I heard you.

The June 20, 2013 "final warning" also does not mention this expression of recalcitrance. Yet Wright, as a human resources manager, would have been particularly concerned about compliance with the Respondent's sexual harassment policy. Both the "talk to my hand" gesture and the responses attributed to Williams by Wright, quoted above, would signify Williams' continuing unwillingness to take the policy seriously. The failure of the "final warning" to mention these matters is consistent with the conclusion to be drawn from Williams' testimony, that such a meeting did not take place.[8]

On June 20, 2013, Maxey and Wright met with Williams to

[7] *The Urban Dictionary*, http://www.urbandictionary.com/define.php?term=talk+to+the+hand.

[8] Wright did testify that she included the reference to hugging and kissing in the "final warning" because, when she asked Williams if he understood, "he said no but he said he heard me, just to make sure that he understood that this was the expectation."

give him this "final warning."[9] According to Wright, they told Williams that based on his conduct on June 17, that they were going to issue a final warning for unprofessional conduct." Wright testified that Williams "got up, said he needed to get his union rep, and stormed out." Maxey's testimony corroborates Wright's, including that Williams said that he "needed to go get his union rep" and then left.

Williams' description of the conversation differs slightly but significantly. Rather than saying that he "needed to go get his union rep.," Williams testified that he *requested* to have Union representation:

> Q. All right.
>
> A. And Sara said, sit down. She said, initially, we called you in here for something minor. And I said, no, ma'am, it's never minor when somebody lies on you. And she said to me, because of those—because of your actions prior to this, we going to put you on final written. And that's when I asked for representation. I said, well, that's—I thought that was a bit—I thought that was a bit steep for something that never occurred.
>
> Q. Okay. Tell me what you said.
>
> A. I said, I want—I said, can I have representation? And she responded, she said, you don't qualify for representation. And I didn't understand that happened—I was like, well you—you know.
>
> Q. Did you say anything?
>
> A. I didn't say—I just repeated the same thing.
>
> Q. What did you repeat?
>
> A. I, you know, I needed representation.
>
> Q. And what happened next?
>
> A. What happened next, she said, no. I got up. I went back to my work.

Thus, in Williams' account, he did not leave the room until after his request for union representation had been denied twice. After Williams left, Wright and Maxey waited for a few minutes. To explain this delay, Wright stated that she and Maxey were expecting Williams to return with someone to represent him. However, Maxey testified that Wright immediately got up to bring Williams back but Maxey, concerned about creating a disturbance in the warehouse, suggested that they wait.

Maxey and Wright went looking for Williams and found him at his work station. When they asked him to return to the conference room, Williams said that he wanted union representation, but Wright denied his request. On cross-examination, Wright testified, in part, as follows:

> Q. And you asked him to come back to the office?
>
> A. Both David and I asked him to come back to the office.
>
> Q. Okay.
>
> A. To the conference room because that's where we had been.
>
> Q. And that's when he said he wanted a union rep.
>
> A. He did at some point state he wanted a union rep.
>
> Q. Okay. And you said he's not entitled to one, he doesn't need a witness for disciplinary action.
>
> A. Correct.

Based upon Wright's testimony that "at some point" Williams requested a union representative and that she replied he was not entitled to one, and based on Williams' testimony that he made this request when first informed of the disciplinary action, before he left the conference room, I conclude that Williams requested and Wright denied his request for union representation before he left the conference room.

Wright and Maxey asked Williams at least twice to return to the conference room. Each time, he requested union representation, which was denied. Wright then told Williams to clock out, presumably meaning to clock out and leave the warehouse.

From Wright's testimony, the sequence of events is not entirely clear. However, it appears that before Wright told him to clock out, Williams returned to his computer to perform one of his work duties, sending emails. Maxey became impatient. He testified that he was "fixing to unplug his computer" but that before he could do it, Williams shut the computer down. Wright's testimony also indicates that Maxey did not actually pull the plug. However, Williams testified that Maxey did carry through:

> Q. Okay. What else were you doing after Ms. Wright told you that you needed to clock out for the day?
>
> A. I was gathering my goods, and I had one e-mail that I had up that I needed to send a customer referring to their shipment, letting them know when their shipment was going to be on time and how it was going to move and what the pro number was, et cetera. And I noticed that, after I'd told him I was collecting my goods. So I went over to get ready to send this. I said, let me go ahead and send this. And Mr. Maxey pulled the plug on the computer. So—
>
> Q. Pulled the plug out of the wall?
>
> A. He pulled the plug out of the—
>
> Q. Out of the outlet?
>
> A. —the terminal block. It's a little block right there with about six plugs on it. The computer was in one of them.

At some point, Williams beckoned to another employee, Jerry Smith III, who was in the warehouse operating a vehicle called a "cherry picker." Smith III was active in the Union and came over to act as Williams' union representative. Smith III testified as follows about what happened next:

> Q. When you approached, could you hear what was happening?
>
> A. As I drove up, I heard some things going, and they were saying something about Stacey to log off the computer and come on back in the office.
>
> Q. Who did you hear say that?
>
> A. Sara Wright.

[9] This meeting likely took place in a first floor conference room. One witness, Jennifer Smith, who was not present during the meeting, testified that it took place in Maxey's office. However, based on the testimony of other witnesses, I believe it more likely that Wright, Maxey, and Williams met in the conference room.

> Q. Did you hear what Mr. Williams's response was?
>
> A. At the time I drove up, Mr. Williams was saying that, Jerry, they won't allow me to have no representation. And I later said, what's going on, and Sara told me, it's none of your business; go back to work. And I later asked, well, he's asking for representation; is he being terminated or something? And she said, it's none of your business. He don't have no representation. Go back to work.
>
> Q. What happened--who was telling you that it was none of your business and go back to work?
>
> A. Sara Wright.

Notwithstanding this rebuff, Smith III persisted in trying to represent Williams. He further testified:

> Q. After she told you a second time to go back to work, what did you do?
>
> A. I continued to ask what was going on, and she told--because Stacey said you all are denying me my rights, and she told Stacey, how about you just log off the computer and go home for the rest of the day and take your badge. And I said, well, he's asked for representation, Sara. And she said he don't have no rights and it's none of your business. And I said, well, you know, that could be charges against the Company for that. And she said she don't care; go back to work. So I went back to work.

Respondent previously had discharged Smith III unlawfully but then had reinstated him to comply with a federal court order. Moreover, Respondent later discharged Smith III again, and he is one of the alleged discriminatees named in the complaint. Therefore, he has an interest in the outcome of this proceeding, which I consider in assessing his credibility.

However, an email which Wright sent to her superior shortly after the incident substantially corroborates the testimony of Smith III. Wright's June 20, 2013 email to Senior Employee Relations Manager Shannon Miles states, in part, as follows:

> At one point Jerry Smith approached me and asked if it was a termination. I told him it was none of his business. He said he was his union rep. I told him that for disciplinary actions, Stacey is not entitled to a union rep. Jerry told me that he was going to file a grievance. I told him to do whatever he wanted, I don't care what you do. I told him to walk away. Sheila at one point walked up and was right near me, I told her to walk away or something like that.

To the extent that this email, or Wright's testimony, conflicts with that of Smith III, I credit the latter. Thus, I find that Smith III referred to charges against Respondent rather than a grievance. There could not be a grievance because Respondent has refused to recognize and bargain with the Union and there is no collective-bargaining agreement.

Wright's email stated that "Sheila at one point walked up . . ." From the record, it is clear that Wright was referring to Sheila Childress, an employee who did walk up during this incident. She testified, in part, as follows:

> Q. BY Ms. MOHNS:
>
> Do you recall anything else that Mr. Williams was saying at that time to Ms. Wright or Mr. Maxey?
>
> A. Okay. He asked for, he asked for representation, and he said I need representation, he said, because I didn't do anything wrong, you know.

Wright's June 20, 2013 email to Shannon Miles also confirms that Williams repeatedly requested union representation:

> We told him we needed him to come with us to the conference room. He said that he needed his union rep. I stated that he was not entitled to a witness for disciplinary actions.

Notwithstanding conflicts in other parts of the record, on this one point the testimony and documentary evidence cohere to form a consistent and convincing picture: The dispute at Williams' workstation centered on Williams' insistence on the presence of a union representative.

The Board had certified the Union as the employees' exclusive bargaining representative on May 24, 2013, less than a month before Williams' repeated requests for union representation. Wright's repeated statements that Williams was not entitled to union representation suggests a hostility to the Union consistent with the animus manifested by the Respondent, and found by the Board, in previous cases.

Other evidence indicates that Wright demonstrated hostility in connection with Williams' request for union representation. Employee Jennifer Smith credibly testified as follows:

> Q. Okay. Now, let's go back. We're back at the work area, at Mr. Williams' workstation. Were their voices raised?
>
> A. Well, Sara, she was kind of yelling at Stacey and Stacey was just—kept saying that he didn't do anything, and they denied him union representation, and he couldn't understand why, and that's all I really heard.

Smith's testimony that Wright was "kind of" yelling must be weighed along with that of another witness, Sheila Childress, indicating that Maxey, Wright, and Williams were just talking. The qualifier "kind of" leads me to conclude that Wright was speaking in a raised tone indicating displeasure but which fell short of actual yelling.

Additionally, the tenor of Wright's June 20, 2013 email to Miles suggests an effort to depict Williams in a bad light unwarranted by the facts. This email stated that "David [Maxey] asked why Stacey wanted to make a disturbance in the warehouse." However, credible evidence does not establish that Williams was making a disturbance. To the contrary, Williams was sitting at the computer trying to complete a job duty. Williams' repeated requests for union representation do not constitute a "disturbance."

In sum, the animus Respondent displayed in previous cases continued to brood over the workplace like an electrically charged thundercloud. At one time, Williams had worn an antiunion shirt provided by Respondent but his views had changed. His requests for a union representative became the lightning rod which attracted the bolt.

The hostility which Wright and Maxey focused on Williams makes me doubt the objectivity and accuracy of their testimony. Although Williams also has an interest in the outcome of this proceeding, it does not appear to have affected his testimony to the same degree. Therefore, whenever the testimony of

Wright or Maxey conflicts with Williams, I credit that of Williams.

On June 20, 2013, after Williams had made persistent requests for union representation, Wright and Maxey escorted him from the building. Respondent then discharged him. The June 25, 2013 discharge letter, signed by Senior Employee Relations Manager Shannon Miles, stated as follows:

> On Thursday, June 20, 2013, David Maxey and Sara Wright tried to administer a write-up to you for prior unprofessional conduct. You left the office, went to the warehouse floor and refused to return. When repeatedly told to go home for the day, you refused.
>
> Based on your violation of OHL's Conduct Guidelines—Unprofessional, inappropriate conduct/insubordination, your employment with OHL is terminated, effective June 25, 2013.
>
> All benefits will be terminated at midnight. COBRA information will be sent directly to you from the benefits center. Enclosed is a document explaining what will happen to your OHL benefits. Your last paycheck stub will be mailed to the home address we have on file.

Before determining what analytical framework should be used to evaluate the lawfulness of the discharge, I will consider Respondent's argument that Williams' requests for union representation do not constitute activity protected by the Act. Respondent's brief states, in part:

> The allegation relating to Mr. Williams is premised on OHL terminating Mr. Williams' employment in retaliation for his request for a *Weingarten* representative. One threshold issue is whether any employees at OHL are entitled to a *Weingarten* representative.

The brief goes on to argue that there has not been a valid certification of the Union and therefore no employees are entitled to a union representative. However, Respondent's argument conflates two very different legal principles. One principle concerns whether Section 7 of the Act protects an employee who requests a representative's presence. A separate issue is whether an employer has a legal duty to honor the employee's request.

The *Weingarten* principle relates to the second issue and defines the circumstances under which an employer must allow a representative to be present. However, contrary to the Respondent's argument, this second issue is not a threshold to the first. The protected nature of an employee's request for a union representative does not depend on whether the employer is obliged to grant the request.

The principle advocated by Respondent would constrict employees' right to request representation and, just as bad if not worse, would introduce uncertainty into whether any particular request enjoyed the Act's protection. Consider this hypothetical situation: An employee reasonably believes, at the start of an interview with a supervisor, that the interview could lead to disciplinary action. At this point, however, the supervisor knows a fact which the employee does not; the supervisor already has decided to impose discipline and has only summoned the employee to impose it.

In such a situation, the employer would have no legal duty to allow a representative to be present. Under the principle advanced by Respondent, the Act would not protect the employee's request for a representative even though the employee acted reasonably in making it. Such a principle is not the law and would be a very pernicious innovation if ever adopted.

Section 7 of the Act protects a number of rights, including the right to "engage in other concerted activities for the purpose of collective bargaining or *other mutual aid or protection*. . ." 29 U.S.C. § 157 (italics added). An employee's request for another employee to be present is an effort to initiate concerted activity for mutual aid or protection and clearly falls within the Act's protection.

Indeed, the present facts clearly demonstrate an attempt to initiate such concerted activity. Williams beckoned to Smith III, who came over to serve as Williams' union representative. Wright thwarted this concerted activity by telling Smith III to leave, but that does not make Williams' request and Smith's response any less concerted or any less protected.

Williams' repeated requests for union representation also constitute protected activity for another reason. These requests furthered the Union's efforts to defend its representative status from the Respondent's continuing unfair labor practices. The violations, found in three previous cases and continuing in the present one, pose a significant danger which the Union is trying to counter.

The Board's 8 decades of decisions describe and document various techniques employers have used to cause employees to become disaffected with and to reject union representation. One common stratagem involves stalling tactics, delaying recognition of a union until the union itself gives up or the employees abandon it. Such tactics involve making the union appear ineffectual by refusing to deal with it. To counter such a strategy, a union looks for ways to remind employees of its continued involvement and to demonstrate that the employer, not the union, bears responsibility for lack of change in working conditions.

Here, the Union provided employees with "Weingarten cards" describing their right to have a union representative present at certain times. Employees affixed these cards to the back of their identification badges. By encouraging employees to request union representation, the Union reminded the Respondent that employees had indeed selected a labor organization to represent them. Each time the Respondent refused a request for union representation, even though the Union had won the election, the denial demonstrated to employees which side bore responsibility for frustrating the collective-bargaining process.

Thus, Williams' request for representation did more than express a desire for a steward's presence. It also constituted action in furtherance of the Union's effort to assert its continuing presence in the workplace, an effort the Union initiated by giving employees the "Weingarten cards." Therefore, making a request for representation clearly constituted protected union activity. Likewise, Williams' persistent requests for union representation, even though management had consistently de-

nied them, conveyed both a protest of Respondent's past unfair labor practices and a firmness of resolve to make the Respondent's tactics unavailing.

The strength of Williams' firmness of resolve, and therefore its significance to Respondent, becomes obvious when considered along with the persistence of Respondent's efforts to defeat the Union. The Board had first conducted a representation election more than 3 years earlier, on March 16, 2010, and, after the parties agreed to set that election aside, held a second vote on July 27, 2011. In a May 2, 2013 decision, the Board noted that the "Respondent's antiunion campaign yielded two [previous] Board decisions finding that the Respondent committed numerous violations of Section 8(a)(3) and (1) of the Act from late 2009 to early 2010." *Ozburn-Hessey Logistics, LLC,* 359 NLRB 1025, 1025 (2013). In its May 2, 2013 decision, the Board resolved the challenged ballot issues, instructed its Regional Director to open and count four of those challenged ballots and to issue an appropriate certification. Regional Office staff issued a revised tally of ballots on May 14, 2013, and, 10 days later, the Union received certification as the employees' exclusive bargaining representative.

At this point, after more than 3 years of unfair labor practices, three Board decisions and ancillary litigation in federal court, Respondent was still treating the Union as if it did not exist. Williams' insistence that he wanted a union representative communicated more than simply a request for someone to be present in an interview which might lead to discipline. By persisting in asking for union representation, Williams was taking a stand, communicating that "enough is enough." It was time for the Respondent to cease its campaign against the Union; it was time for the Respondent to recognize and deal with the Union as the employees' exclusive representative.

In Williams' case, the Respondent's long campaign had produced an effect opposite to that intended. At one point, Williams had worn the antiunion shirt the Respondent gave him, but no longer. Now, he held fast with a convert's zeal. His repeated requests for a union representative expressed the sentiments of the other employees whose votes had resulted in the Union's certification. They would no longer be bullied.

Before considering the lawfulness of Williams' discharge, I must first decide which analytical framework is appropriate. When the determinative factor concerns whether an employee's protected activities were considered during the decision to discharge and affected that decision, the *Wright Line* framework puts motivation under the microscope. However, when an employee is discharged for something he supposedly did while engaged in protected activity, the Board examines the facts under a different standard. See *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964); *Keco Industries*, 306 NLRB 15, 17 (1992); cf. *Primo Electric,* 345 NLRB 1187 (2005). Sometimes, the Board evaluates the discharge using both frameworks. See, e.g., *Waste Management of Arizona*, 345 NLRB 1339 (2005).

Here, I believe it is appropriate to follow the *Burnup & Sims* framework because Respondent discharged Williams for conduct during the course of protected activities, his repeated requests for a union representative. This analytical process requires that I determine whether the employee, while engaged in the protected activity, also has engaged in misconduct sufficiently serious as to forfeit the protection of the Act.

As the Board stated in *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006), to determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors:

(1) the place of the discussion;
(2) the subject matter of the discussion;
(3) the nature of the employee's outburst; and
(4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

Of course, before performing this analysis, the assertedly "opprobrious conduct" must be identified. To identify the claimed misconduct, I look to the reasons which Respondent gave for the discharge and do not speculate about other possible reasons which the Respondent might have asserted but did not.

For example, in the present case, Managers Wright and Maxey described Williams as being loud and disruptive. Based on the credited testimony of other witnesses, I find that he was neither loud nor disruptive.[10] However, regardless of my findings on that point, I would not evaluate Williams' supposed loudness by applying the four-factor test because the Respondent did not claim that it discharged Williams for that reason. Rather, the June 25, 2013 discharge letter to Williams identified the following as the unprofessional, inappropriate and insubordinate conduct which resulted in the termination of Williams' employment:

> You left the office, went to the warehouse floor and refused to return. When repeatedly told to go home for the day, you refused.

The credited evidence does not support the letter's claim that, when told to go home, Williams refused. To the contrary, Williams gathered his things and was in the process of turning off his computer when Maxey pulled the plug.

However, the record does establish that Williams refused to return to the conference room where he, Wright, and Maxey had been talking. Williams refused because Wright and Maxey denied his request for union representation. Indeed, Wright's June 20, 2013 email describing what happened to Miles included the following:

> We told him we needed him to come with us to the conference room. He said that he needed his union rep. I stated that he was not entitled to a witness for disciplinary actions. David asked him twice to come to the office and Stacey refused.

[10] When asked whether Williams was "yelling or making a scene" Jennifer Smith testified that he was not. Because she is an alleged discriminatee in this case, Smith has some interest in the outcome which arguably might affect her testimony. However, another witness, Sheila Childress, did not. She remained employed by Respondent, albeit on sick leave, at the time she gave testimony and she properly may be considered a neutral witness. She testified that Wright, Maxey, and Williams were "just talking" and not screaming. Based on the credited testimony of Childress, corroborated by that of Jennifer Smith, I find that Williams was not talking in a loud voice.

In applying the four-factor test, I first consider the place of the discussion, which was the warehouse floor. Some other employees were witnesses. Accordingly, this faction militates in favor of finding the conduct forfeited the Act's protection.

The second factor concerns the subject matter of the discussion. Williams' request for a union representative constituted part of that subject matter, as did the managers' instruction that Williams should return to the conference room. This factor does not tilt the scales in either direction.

Although the third factor concerns "the nature of the outburst" there was no outburst. Williams simply persisted, firmly, in asking for a union representative.

The fourth factor asks whether the employee's "outburst" was provoked in any way by the Respondent's unfair labor practices. It should be stressed that I do not consider the denial of representation, in this instance, to be an unfair labor practice. The managers were instructing Williams to attend a meeting which did not involve the investigation of facts possibly leading to discipline but rather the imposition of discipline already decided.

However, the Respondent has a long history of unfair labor practices involving employees in the bargaining unit, as found in previous Board decisions. These unfair labor practices had delayed the certification of the Union and now, notwithstanding the recent certification, the Respondent still refused to recognize the Union as the employees' representative. This factor heavily weighs in favor of finding that Williams' actions were not so opprobrious as to forfeit the protection of the Act, and I so find.

In sum, I conclude that Respondent's discharge of Williams violated the Act.

Although I believe that the *Burnup & Sims* framework provides the more appropriate way to evaluate this allegation, in case the Board should disagree, I will now analyze the facts under the *Wright Line* framework.

Clearly, for reasons discussed above, Williams' repeated requests for a union representative constitute activity protected by the Act. Since he made these requests to an admitted supervisor and agent of Respondent, the record also establishes Respondent's knowledge.

Moreover, the management official who made the discharge decision clearly knew about Williams' protected activity. This official, Senior Employee Relations Manager Miles, worked at the Respondent's headquarters in Brentwood, Tennessee, near Nashville, and not at the Respondent's facilities in Memphis. Her knowledge of the relevant events came from Wright. One of Wright's emails to Miles, quoted above, informed her of Williams' request for a union representative.

Moreover, Miles also reviewed statements which Wright had taken from witnesses to the relevant events. A number of these statements refer to Williams requesting union representation.

Additionally, when Mills took the witness standard she admitted and, in fact, volunteered that Williams had requested union representation. Miles gave the following testimony about what happened on June 20, 2013, after Williams left the meeting with Wright and Maxey and returned to his workstation:

> Q. Do you know what happened after that?
>
> A. They went, told him you need to come back up, we're not finished; we need to talk to you.
>
> Q. Not finished with what?
>
> A. With talking to him, giving him the disciplinary action.
>
> Q. Do you know how Mr. Williams reacted or how was it reported to you that Mr. Williams reacted?
>
> A. That he said that he wanted a union representative. And he was told that he couldn't have one.

The Respondent's history of unfair labor practices directed against the Charging Party Union amply establishes antiunion animus. Therefore, I conclude that the General Counsel has made an initial showing sufficient to prove that Williams' protected activities were a substantial or motivating factor in the decision to discharge him.

Respondent has not carried its rebuttal burden. The record does not establish that other employees have been discharged for similar conduct. In other respects, credible evidence does not persuade me that Respondent would have taken the same action in the absence of protected activity. Therefore, a *Wright Line* analysis would also lead me to conclude that Respondent's discharge of Williams, alleged in complaint paragraph 13(h), violated the Act, and I recommend that the Board so find.

Complaint Paragraph 13(i)

Complaint Paragraph 13(i) alleges that since about June 2013, Respondent has imposed onerous and rigorous terms and conditions of employment on its employee Jennifer Smith by assigning her to more arduous and less agreeable job assignments. Respondent denies this allegation. It also denies that it took this alleged action because Smith assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 13(o). Further, it denies that it took the alleged action because Smith was named in an unfair labor practice charge against the Respondent, because she gave affidavits and cooperated in Board investigations, or because she testified in prior Board hearings, as alleged in complaint paragraph 13(a). Respondent also denies that it thereby violated Sections 8(a)(4), (3), and (1) of the Act.

As already noted, a number of individuals named Smith gave testimony in this case. In this section of the decision, related to complaint paragraph 13(i), I will refer to Jennifer Smith simply as "Smith" but will give a more complete reference, if needed, to others with that last name.

Smith began working for Respondent in 2008 and was active for the Union from the outset of the organizing campaign which began in 2009. She advocated the Union to other employees, solicited employees to sign authorization cards, and wore at work attire with the union name or insignia.

In *Ozburn-Hessey Logistics, LLC*, JD(ATL)-12-12 (May 15, 2012), the Honorable Robert A. Ringler found that the Respondent violated the Act when it gave Smith a final warning. Judge Ringler further found that Respondent's asserted defense was a pretext and that antiunion animus motivated its action. The Board affirmed Judge Ringler's determination for the reasons given in his decision and then discussed additional circumstances which supported both the conclusion that the disci-

pline was unlawful and the conclusion that Respondent's asserted reason for the discipline was pretextual. In this regard, the Board observed that it "appears that the Respondent was using its antiharassment policy to target union supporters." *Ozburn Hessey Logistics*, 359 NLRB 1025, 1026. The Board adopted Judge Ringler's order that Respondent rescind and expunge the discipline.

Smith also testified in an earlier case involving the Respondent, but the judge dismissed allegations that Respondent had violated Section 8(a)(3) and (4) of the Act by disciplining her. The Board noted that no exceptions were taken to this determination. *Ozburn-Hessey Logistics*, 357 NLRB 1456, 1456, fn. 1.

In June 2013, Smith's assigned duties involved checking shipments before they left the warehouse to be sure the goods being shipped matched the customer's request. According to Smith, this work as an "auditor" did not involve as much physical exertion as that of two other assignments, as "picker" and "packer." Those tasks involve retrieving goods for a shipment and preparing the shipment. Before June 2013, Smith did have to do such work about 4 or 5 days a month, but otherwise she performed "auditor" duties.

According to Smith, after Respondent discharged Stacey Williams, Operations Manager Maxey announced that he was going to cross-train employees and assigned her to picker duties. She further testified that she has not returned to auditor duties since June 2013.

At the outset I must consider whether the change in job duties, which did not affect Smith's pay rate or working hours, amounted to an "adverse employment action." The General Counsel argues that the auditor duties were lighter and that the picker and packer work were more onerous. However, Operations Manager Maxey testified that he actually assigned Smith to less strenuous work. Maxey explained that the prospect of losing a customer spurred him to study how efficiency might be improved, and this study took him to the warehouse floor to observe employees at work:

> I noticed Jennifer [Smith] was calling order pickers over there to help her stack her pallets. So I called the team, I called the group together. Well, actually, it was just Gladys and Jennifer at that time because I'd already moved Sheila to doing small part audits. And so I called them over there and I said, the expectation is that you guys do—this is your job. This is what you got to do. And Jennifer made a comment, well, some of them boxes is too heavy. She couldn't stack her pallets. And I said, well, that's a part of the job. I said, that's the auditor's responsibility so you're going to have to do that. I said, these guys are supposed to be picking orders. They don't have time to stop and come over and help you do your job.

On persistent cross-examination by Respondent, Smith ultimately admitted she had received help from other employees, but appeared reluctant to admit that she had *asked* them for help:

> Q. When you were auditing, did you request the help of pickers to help you stack pallets?
>
> A. I'm going to be very honest. I did not restack those pallets. I would get on those guys and tell them, look, stack the stuff right so I don't have to lift this stuff and move it, and most of the time, they would bring that stuff up stacked right so I wouldn't have to move anything off the pallet.
>
> Q. Okay. But if there's a large pallet, to audit it—let me back up. In the Browne Halco account, there's 100 percent audit, right? Every box that goes out gets audited, right?
>
> A. Correct.
>
> Q. Okay. And so if you have a large pallet—
>
> A. Uh-huh.
>
> Q. —to get to the boxes that are stacked in the center of the pallet, the boxes on the outside have to be taken off and put on the floor, right?
>
> A. I don't audit like that. Ms. Dawson audits that way. She takes all her stuff off the pallets I don't.
>
> Q. She does that herself.
>
> A. She does that herself.
>
> Q. Okay. And you would have pickers assist you with that, right?
>
> A. Well, we sometimes assist each other So maybe every so often a picker will come up, but I was just like I can't stop them from working to come up here unless it's something wrong with the pallet. I will call them back up and, you know, say, well, I don't have this or I'm short on this. Can you come up here.
>
> Q. And sometimes you would say I need help unpacking the pallet for lack of a better word, right?
>
> A. Moving something off the pallet.
>
> Q. Moving something off the pallet.
>
> A. Okay.
>
> Q. Okay. And then you would need the picker's help to stack it back up on the pallet, right?
>
> A. Yeah. Yes, sir.

Thus, although Smith did not quite admit a practice of *asking* other employees for help she did ultimately admit that she *needed* their help to perform the auditor's duties. Whether or not she asked, the result was the same. Employees interrupted their assigned duties to help her.

Smith's responses on cross-examination lead me to believe that on this particular issue, her testimony is not as reliable as Maxey's. Although previously, I did not credit Maxey's testimony concerning a different matter, I do credit his testimony concerning the reassignment of Smith to other job duties. As already noted, Smith's admission on cross-examination does support Maxey's explanation as to why he reassigned her: She could not perform all the auditor's job duties by herself.

Although the government argues that Smith's reassignment resulted in more onerous duties, based on the following credited testimony of Maxey, I find that, if anything, the opposite was true:

> A. And then I moved Jennifer, because since she was struggling with picking up heavy boxes, I moved her to small part picking, which basically now instead of picking a 40-pound case of silverware, now you're picking a couple of dozen, because you're picking small part orders that are going to go FedEx Ground. So the orders are a lot lighter and a lot smaller and easier to handle.

Q. Is small items picking more or less strenuous than auditing?

A. It should be less, to me.

The General Counsel's brief, citing various testimony, argues that an auditor's work is easier than a picker's, but this testimony does not, in my view, sufficiently reflect that different pickers perform different tasks. Maxey credibly testified that he assigned Smith to *small parts picking*. Based on his testimony, I conclude that the job of small parts picker is not appreciably more arduous than that of auditor.

In sum, the government bears the burden of establishing that the alleged discriminatee has suffered an adverse employment action, but has not carried that burden here. Finding no adverse employment action, I cannot conclude that there has been an act of discrimination.

Most certainly, when credited evidence establishes that an employee has been assigned demonstrably more arduous tasks, that change can constitute an adverse employment action and, if unlawfully motivated, can constitute an unfair labor practice. See, e.g., *Chinese Daily News*, 346 NLRB 906 (2006), in which the Board found some changes lawful but others violative. In the present instance, however, credited evidence only establishes that the duties were different, not more arduous.

Therefore, I recommend that the Board dismiss the unfair labor practices relating to complaint paragraph 13(i).

Complaint Paragraph 13(j)

Complaint paragraph 13(j) alleges that about September 2013, Respondent required employees Glenora Whitley and Jill McNeal to submit to drug and alcohol testing. Respondent denies this allegation. It also denies the related allegations that it did so for unlawful reasons and thereby violated the Act.

This allegation is perhaps the most puzzling in the complaint. Employee Whitley testified that Operations Manager Quinn Farmer sent her to another building for a random drug test sometime in September 2013, that she took the drug test and passed it, and then went back to work. The Respondent denies that it performed any random drug testing at that time and specifically denies that it tested Whitley. It called Farmer to the witness stand and he denied ever sending Whitley for such a drug test.

Respondent's brief states, in part, that the claimed "test is apparently a fiction of Ms. Whitley's imagination. No record of it exists. Moreover, Ms. Whitley's story is not even logical. She claims that she was instructed to go to HR. However, she claims that rather than go to the HR office in the Hickory Hill building where she worked, she went to a different HR office in a different building down the road."

The General Counsel's brief argues that the Respondent should have called to the witness stand the human resources coordinator, Megan Ferrone, who supposedly did the drug test and that its failure to call Ferrone gives rises to an inference that she would have confirmed doing the drug test. However, the brief fails to explain why the drug test would have constituted an adverse employment action even if it had occurred.

Other evidence establishes that when the Respondent performs a drug test, the employee is "on the clock" and being paid for the time. Moreover, Whitley testified that the drug test proved negative and that she returned to work. Where is the harm?

Certainly, there can be circumstances in which singling out union supporters for drug tests could constitute discriminatory treatment which violated the Act, but there is no evidence that Whitley was treated any differently from any other employee.

Whitley testified that she was given a *random* drug test. The word random itself indicates that there was no discrimination based on any factor other than chance. The General Counsel bears the burden of proving that an assertedly random selection system had been rigged to single out union supporters but did not carry that burden here.

Moreover, based on my observations of the witnesses, I do not credit Whitley's version but instead credit Farmer's testimony that he never sent Whitley for a drug test. Because I do not credit her testimony, I do not find that she ever was sent for a drug test. Therefore, I will not draw an adverse inference from the fact that Ferrone did not take the witness stand.

Complaint paragraph 13(j) also alleges that about September 2013, Respondent required employee Jill McNeal to submit to drug and alcohol testing. No evidence supports this allegation and I find it without merit.

In sum, I recommend that the Board dismiss all of the allegations related to complaint paragraph 13(j).

Complaint Paragraph 13(k)

Complaint paragraph 13(k) alleges that about September 6, 2013, Respondent issued a final warning to employee Jerry Smith. Respondent admits this allegation. However, it denies that it did so because Smith assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 13(o). It also denies that it took this action because Smith cooperated and gave affidavits in Board investigations, was named in an unfair labor practice charge and testified in previous Board hearings, as alleged in complaint paragraph 13(p). It further denies that its issuance of the final warning to Smith violated the Act.

The warning concerned Smith's conduct on August 30, 2013, when he placed union-related material on a table in a break room following an employee meeting. My findings about what took place on that occasion are set forth above, in detail, in connection with complaint paragraph 7(b). This warning states, in part:

> On August 30, 2013, following a pre-shift meeting in the break room, Jerry Smith distributed literature while on the clock during working time. When the Director of Operations confirmed that he was on working time and informed him that he was not permitted by OHL policy to distribute literature on working time, Mr. Smith responded that he did not care and continued to distribute the literature. Mr. Smith's actions were both insubordinate and a violation of OHL's solicitation/distribution policy.

Thus, the warning states two grounds for the discipline: (1) Smith III was insubordinate and (2) violated the Respondent's no solicitation/no distribution policy. From the warning's language, I conclude that the putative insubordination consisted of

two parts: (1) Smith III saying he did not care in response to the director of operations' statement that OHL policy did not permit the distribution of literature on working time and (2) Smith continuing to distribute literature after the director of operations made this statement.

Contrary to the language on the warning, for the reasons discussed above, I have found that Smith III did not say that he did not care, but just explained that he was only dropping the materials off. However, although the analysis of evidence related to complaint paragraph 7(b) resulted in a finding that Smith III did not make the "did not care" statement attributed to him, additional factual findings are necessary now.

The warning's claim that Smith III "continued to distribute the literature" after the director of operations stated that OHL policy did not permit him to distribute literature on working time presents one and possibly two unresolved factual questions. First, I must determine whether the director of operations made such a statement about OHL policy. Second, if the credited evidence establishes that he did, I must determine whether Smith III continued to "distribute literature" after that point.

As to the first question, Smith III quite clearly testified that Director of Operations Smith did not make such a statement. Smith III testified, in part, as follows:

> Q. And there was no--your testimony is there was no discussion of the solicitation rules between you and Mr. Smith and Mr. Maxey--
>
> A. No.
>
> * * *
>
> Q. Okay. I think this is my last question about August 30th. This is in the break room with Phil Smith. And you say he did not remind you or tell you anything about how you were violating the no solicitation policy. Was that your testimony?
>
> A. Yes.
>
> Q. Then what did you then--why was there any discussion about repercussions?
>
> A. That's a good question. Because that's what he told me when I left.

Equally forceful was the contrary testimony of Director of Operations Smith, quoted above in connection with complaint paragraph 7(b). Moreover, on the day of the incident, August 30, 2013, Director of Operations Smith made a note about what had happened in the break room. His note included the following:

> Jerry Smith came back into the breakroom with several USW "Our Union" pamphlets and placed them on 1 breakroom table. As he did this I asked Jerry if he was on the clock. Jerry stated "Yes". I then told Jerry he could not do this (place pamphlets) while on the clock as it was a violation of the OHL "No Solicitation Policy" and a violation of Federal Law. Jerry continued to place some of the pamphlets on the other 3 breakroom tables and I again told him he could not do this. Jerry stated "I don't care I want the employees to have more current information".

This nearly contemporaneous note is consistent with and supports Director of Operations Smith's testimony. Operations Manager Maxey also wrote an August 30, 2013 note about what had happened that day. Maxey's note did not indicate that Director of Operations Smith specifically mentioned the OHL Solicitation Policy or Federal Law. It simply stated that "Phil told him that he could not do this while on the clock." Maxey gave testimony to the same effect.

A witness, Nathaniel Jones recalled that Director of Operations Phil Smith was angry but could shed no light on exactly what Smith had said. Nonetheless, Jones' credited testimony that the director of operations was angry provides an important clue. In the analysis related to complaint paragraph 7(b), above, Jones' testimony about Phil Smith's anger had weighed in favor of the conclusion that Phil Smith indeed had made the "repercussions" remark attributed to him by Smith III. Now, Jones' testimony about Phil Smith's anger again becomes important to resolving a conflict in the testimony, but this time it leads me to credit the testimony of Phil Smith rather than Smith III.

Anger prompts words and becomes apparent through them. If the director of operations did not express his anger by telling Smith III that distributing the literature was prohibited, it is difficult to imagine what he would have said in this context. Unless the anger were so great it resulted in cyclical sputtering, Phil Smith would not simply ask Smith III, over and over, if he were on the clock. Instead, it would prompt words of prohibition.

Moreover, as Respondent's counsel asked Smith III on cross-examination, if Phil Smith had not stated that the distribution of literature was prohibited, why would he have said there would be repercussions? I find that the director of operations did inform Smith III that the distribution of literature was prohibited during working time. Whether Phil Smith specifically said that it was against federal law is another, more difficult question. The extent of his anger may have affected his recollection.

However, it is highly likely that the director of operations said something consistent with what Maxey stated: "Phil told him that he could not do this while on the clock." I so find.[11]

Having found that the director of operations did make a statement about distribution being prohibited at that time, I must determine whether Smith III continued to "distribute literature" after being informed or reminded of the prohibition. The word "distribution" might suggest the handing out of literature to other employees but that did not happen. Rather, the "distribution" consisted of putting the materials on tables.

Placing the materials on the tables did not take long, but it did require some time. Although Smith III denied that the director of operations said anything about OHL policy, it does indicate that he continued to set out the materials after he acknowledged that he was on the clock:

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[11] Thus, I have credited Smith III's testimony that he did not make the "I don't care" remark but I have not credited his denial that the director of operations told him that distributing literature during working time was prohibited. The Board has long held that a fact finder's failure to credit part of a witness' testimony does not preclude crediting other parts of his testimony. *Service Employees Local 1877 (American Building Maintenance)*, 345 NLRB 161 fn. 1 (2005), citing *TNT Skypak, Inc.*, 312 NLRB 1009 fn. 1 (1993); *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

> Q. After you made that response, did Phil Smith make any other comments?
>
> A. Well, *he continued to watch me as I put the books on the tables*, and then as I was walking out the door, he was behind me and he said, there's going to be some repercussions behind this. (Italics added.)

Smith III's testimony that the director of operations continued to watch him as he placed the books on the tables is consistent with Phil Smith's account. His nearly contemporaneous August 30, 2013 note stated that Smith III had placed material on one table before being told that it was against policy and then put literature on the other three tables after receiving the information.

Although I found that Smith III did not make the "I don't care" remark which Phil Smith attributed to him, he did disobey the latter's instructions. Knowingly failing to follow supervisor's order constitutes insubordination whether accompanied by defiant words or not. Therefore, I conclude that Smith III was, in fact, insubordinate. Whether it was lawful to discipline Smith III for this insubordination—ignoring the supervisor's order to follow the Respondent's no-distribution policy—depends on the lawfulness of the policy itself.

Before examining this issue, it may be noted for clarity that the September 6, 2013 final warning disciplined Smith III both for failing to follow the Respondent's no-distribution policy and for the insubordinate act of failing to obey the manager's instruction to follow that policy. Smith III violated the policy itself the first time he placed the literature on a table, but that first "distribution" did not constitute insubordination because Smith III had not yet been ordered to follow the policy. When Smith III went ahead and placed literature on the remaining tables after the director of operations told him not to do so, he violated the no-distribution policy itself and also committed insubordination.

It may also be noted that, for reasons discussed above, a *Wright Line* analysis would not be appropriate. Here, Respondent admitted disciplined Smith III for activity which the Act may protect. Its motivation is not in issue. Rather, the issue concerns whether Smith III's distribution of union-related materials really was protected. If so, then the next question is whether Smith III engaged in any misconduct sufficient to forfeit the protection of the Act.

In the absence of egregious of opprobrious misconduct sufficient to forfeit the Act's protection, a determination that the Act protected Smith III's distribution of union literature on this occasion would result in the conclusion that Respondent unlawfully disciplined him. If the Act indeed protected the conduct under the specific circumstances which existed, a policy prohibiting that conduct under those circumstances would be invalid. Similarly, the lawfulness of a penalty for disobeying an order to follow the policy depends on the lawfulness of the policy under the specific circumstances.

In general, an employer lawfully may prohibit employees from distributing materials during working time. Thus, the Respondent's policy is lawful on its face. However, it would not be lawful for the Respondent to apply this facially lawful policy in a manner which treated union-related literature less favorably. For example, if an employer did not discipline an employee who, during his working time, distributed flyers for a veteran group's fish fry, but did discipline an employee for distributing a union-related leaflet during his working time, the policy would be invalid as applied and the discipline would be unlawful.

Although the Respondent's no distribution policy is facially lawful, the government argues that Respondent disparately enforced it. The General Counsel's brief states, in part, as follows:

> Smith credibly testified that the long-standing practice in the Browne-Halco account has been that employees are permitted to go to their lockers to put away items, retrieve items from their lockers, get coffee or water to drink on the work floor or get items from the vending machines. (Tr. 89-93). Smith testified that this practice pre-dated Maxey's assignment to Browne-Halco as manager and continued after August 30, 2013. (Tr. 208-209). While Maxey first claimed that employees were required to go directly to their work area after the pre-shift meeting and he had never witnessed employees engaged in other activities, he later admitted that he did not prevent employees from going to their lockers or performing other non-work tasks in the few minutes after the pre-shift meetings. (Tr. 2237-2238). Thus, while the employees were on the clock, they were permitted for a short period of time to engage in non-work activities. Respondent nonetheless sought to prohibit Jerry Smith from taking less than one minute to place some Union materials on table in the break room during this period when non-work tasks are permitted. By allowing certain non-work tasks but excluding others, specifically Union organizing activities, Respondent is discriminatorily enforcing its rules concerning what activities are permitted in the minutes following the pre-shift meeting. Employer may not lawfully permit non-work activities during working time while prohibiting only union activities. See *The Register Guard*, 351 NLRB 1110 (2007) (Disparate treatment of activities of a similar character are prohibited where certain activities are prohibited because of their Section 7 protected status).

The General Counsel's argument rests on a subtle but consequential enlargement of the "disparately applied" principle. As usually understood, a disparate application of the "no distribution during working time" rule would involve allowing employees to *distribute* certain times of literature during working time but prohibiting them from distributing Union-related literature during working time. The General Counsel's brief does not cite any instance in which the Respondent has allowed the distribution of materials and my reading of the record found none. Thus, applying the customary analysis, I conclude that the government has not established any disparate application of the no-distribution rule.

However, the government argues for a somewhat different approach. Its brief cites testimony that Respondent allowed employees to retrieve items from their lockers and to get coffee or water on the way to their work stations, and argues that such instances are proof of disparate application. But the Respondent's no distribution rule does not prohibit such activities, which do not involve distribution of anything. Perhaps allow-

ing employees to make a quick stop at their lockers would bend or even break some other work rule not at issue here, but it does not affect the application of the no distribution rule.

In effect, the General Counsel is equating a prohibition on distribution of literature during working time with any other rule forbidding employees from straying from their assigned tasks while on the clock. The government's argument assumes that getting a cup of coffee or a bottle of water is "activity of a similar character" to distribution of literature because both activities take time away from work duties. Certainly, it is true that labor lawyers and human resources professionals sometimes explain the reason for a no-solicitation rule by repeating an old aphorism: "Working time is for work." However, there are other considerations.

When an employee is on the clock and the employer is paying for the employee's time, the employer doubtlessly has the right to decide which activities it will allow to further productivity. Letting an employee stop to get a bottle of water certainly contributes at least indirectly to efficiency. Indeed, the present record suggests that some work areas are hot, making the availability of water important to workplace safety and health. Therefore, allowing employees to be paid for the time spent obtaining water reasonably would be in the employer's interest, as well as the employees'. However, no similar benefit in workplace health, safety, and comfort derives from allowing employees to distribute any kind of reading matter while being paid to work.

Determining whether a no-distribution rule has been disparately applied has been a rather straightforward matter involving an examination of what materials an employer has allowed to be distributed and what materials it has not. The analysis thus has entailed a comparison of apples to apples. The General Counsel now argues, in effect, for a comparison of apples to apples, oranges, bananas, and kiwi fruit. Expanding the analysis in this way would invite continuing arguments over what fruits are similar enough to apples to be included in the comparison and which are not.

In sum, I conclude that the appropriate disparate application test focuses on whether the Respondent has previously allowed employees to distribute any kind of literature other than union-related during their working time. The record does not establish that the Respondent has permitted the distribution of any literature at all during working time, so I conclude that the rule has not been disparately applied or enforced.

Because the no-distribution rule was lawful both facially and as applied, the Act did not protect Smith III when he flouted it. Therefore, Respondent acted lawfully when it issued a final warning to Smith III for violating its no-distribution rule and for disregarding an instruction to follow it.

Accordingly, I recommend that the Board dismiss the unfair labor practice allegations related to complaint paragraph 13(k).

Complaint Paragraph 13(l)

Complaint paragraph 13(l) alleges that about September 18, 2013, Respondent issued a final warning to its employee Jennifer Smith. Respondent's answer admits this allegation, but denies that it issued this warning because Smith assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 13(o). It also denies that it took this action because Smith cooperated and gave affidavits in Board investigations, was named in an unfair labor practice charge, and gave testimony in Board proceedings, as alleged in complaint paragraph 13(q). Further, Respondent denies that its action violated the Act.

Notwithstanding that Respondent's answer admits that it issued a *final* warning to Jennifer Smith, the record indicates that the warning was a "written warning," one step below a "final warning" and I so find. Human Resources Manager Wright testified that Respondent didn't issue a final warning because there was no witness to the actual event. The warning itself bears the designation "Written Warning," and states, in pertinent part, as follows:

> On Friday, August 30, Jennifer and Luz Balderrama were in the restroom. Jennifer touched Luz with her pointed finger three times.
>
> Later the same day, Luz and Gladys Dawson were in the restroom when Jennifer came in. Jennifer admitted to Gladys at that time that she had touched Luz earlier that day and touched Gladys' shoulder with a pointed finger three times to demonstrate how she had touched Luz.
>
> Jennifer is not to make any unwanted physical contact with any co-worker. Any further incidents or violations of policy will lead to additional discipline, up to and including termination.

The discipline resulted from an encounter between employees Jennifer Smith and Luz Balderamma in a restroom during working time. Respondent conducted an investigation after Balderrama reported to management that Smith had solicited her to sign a union card and, when she refused, pushed Balderrama three times. Balderrama, who speaks English as a second language, testified as follows:

> Q. Okay. And was there a time in September of 2013, when Jennifer Smith came into the restroom, the bathroom, when you were there?
>
> A. Yes.
>
> Q. Okay. And when she came into the bathroom, what did she say to you?
>
> A. She—every time she say I need sign the card for union card because she say if you sign the card, this protect my job, right. She say you no lose your job and everybody respect to you, but I don't want it because I'm in there for OHL, right.
>
> Q. Okay.
>
> A. And she start saying you need sign the card, and you need sign the card. I said leave me alone, but she very upset at me, and she push me right here hard. She push three times.
>
> Q. In the chest?
>
> A. Uh-huh.

For several reasons, I believe Balderrama's testimony is reliable. At the time she testified, she no longer was employed by

Respondent and is not alleged to be a discriminatee. Thus, she had nothing to gain through her testimony. Additionally, she admitted without hesitation that she sometimes had been late to work. This admission reinforced my impression that she was trying to testify accurately to the best of her recollection. Moreover, as will be discussed further below, the testimony of another witness, Gladys Dawson, provides at least indirect support for Balderrama's version.

However, I do not have as much confidence in the reliability of Jennifer Smith's testimony. As part of its investigation, the human resources department asked Smith to fill out a questionnaire describing what happened. Smith's responses raise doubts about her credibility.

The questionnaire asked Smith not only about the encounter with Balderrama described above, but also about a later incident in the restroom that same day. Specifically, the questionnaire asked Smith if she had a second discussion with Balderrama in the restroom that day. Smith denied such an encounter both in responding to the questionnaire and later in her testimony. However, both Dawson and Balderrama testified that there was such an encounter.

Even more significant was Smith's response to a final question, which asked "Is there anything else we need to know about this situation?" Smith, referring to Balderamma as "C'C" (Ceci, Balderamma's nickname), wrote the following:

> Yes. C'C has previously lied on me just because she didn't like the way I said sumthing [sic] to her so she then go tell everybody about it and they tell her well you shouldn't let her tell you anything, so I don't know what the problem is. I'm still not mad that she made up sumthing to try to get me wrote up, cause I'm sure this won't be the last time because she has done this several times.

These words create the impression that Smith was referring to a specific incident in which Balderrama made a false statement about Smith to others. The victim of a lie, particularly a lie told to more than one coworker, typically experiences strong emotions, including hurt and anger. Such feelings create indelible memories, making the incident quite difficult to forget.

The human resources department gave Smith a second questionnaire to obtain additional information. It asked: "In your questionnaire, you stated that 'Cici has previously lied on me.' Please describe any such incidents that have occurred and provide as many details as possible. Attach additional paper if necessary." Smith's one-sentence answer did not require additional pages:

> I can't recall the specific at this time, but there were false allegations made.

Smith's answer casts doubt on her credibility. Because accusing someone of lying is so serious, a responsible person does not make such a charge without articulable reasons. Moreover, as noted above, the target of a lie does not easily forget the circumstances. Considering Smith's claim that Balderrama "has done this several times," it particularly strains credulity that Smith could provide no details.

Additionally, employee Gladys Dawson credibly testified that Smith later admitted that she had touched Balderrama. In making this admission, Smith touched Dawson to illustrate her claim that she had only tapped Balderrama lightly. However, on the questionnaires, Smith had unequivocally denied making physical contact with Balderrama or anyone else. Believing Dawson, I must conclude that Smith's questionnaire responses were less than forthright.

Because of these concerns about Smith's testimony, and because I believe Balderrama was a reliable witness for reasons discussed above, I credit Balderrama's testimony rather than Smith's. Based on that credited testimony, I find that Smith did push Balderrama three times in the restroom and further find that this battery was unprovoked. Crediting Balderrama, I find that it was sufficiently forceful to cause a bruise.

The credited testimony establishes that Smith pushed Balderrama after Balderamma refused to sign a union card. Because Smith was disciplined for misconduct during the course of arguably protected activity, an analysis under the *Burnup & Sims* framework rather than the *Wright Line* appears to be more appropriate. I conclude not only that the Respondent had an honest belief that Smith had engaged in misconduct, but also that Smith had, in fact, done so.

Under the circumstances, I conclude that this misconduct was sufficiently opprobrious to forfeit the protection of the Act. In reaching that conclusion, I note an employer's responsibility to take steps to prevent workplace violence and its potential liability for failing to do so. Because Smith had asked Balderrama to sign a union card and pushed her after she refused, it may also be noted that the Act protects an employee's right to refrain from union activity.

Were to evaluate the facts under a *Wright Line* framework, I would conclude that the government had made the initial showing necessary to shift the burden of proceeding to the Respondent. Smith had engaged in extensive protected activity, including giving testimony in previous Board cases, an activity obviously known to Respondent. Moreover, Senior Employee Relations Manager Miles admitted knowing about Smith's protected activities. Previous Board decisions also establish the presence of antiunion animus.

However, I would conclude that Respondent had met its burden of showing that it would have imposed the same discipline in any event. In reaching that conclusion, I note that the Respondent did not discharge Smith or even give her a final warning, but only issued a written warning. The record does not indicate that Respondent treated Smith more harshly than it would have treated any other employee who had pushed another hard enough to raise a bruise. Moreover, legitimate business concerns, its potential liability if it failed to maintain a workplace free of violence, created a strong reason to take disciplinary action.

For all these reasons, I recommend that the Board dismiss the allegations related to complaint paragraph 13(l).

Complaint Paragraph 13(m)

Complaint paragraph 13(m) alleges that about October 2, 2013, Respondent discharged its employee Jerry Smith. Respondent's answer admits this allegation. However, Respondent denies that it discharged Smith because he assisted the Union and engaged in concerted activities, and to discourage em-

ployees from engaging in these activities, as alleged in complaint paragraph 13(o). It also denies that it terminated Smith's employment because he cooperated and gave affidavits in previous Board investigations, was named in an unfair labor practice charge against Respondent, and testified in previous Board hearings, as alleged in complaint paragraph 13(r). Respondent also denies that its discharge of Smith violated the Act.

These allegations pertain to events at Respondent's warehouse at 5540 East Holmes Road, in Memphis, sometimes called the "5540 building." The warehouse manager, Jim Steele, reported to the human resources department that he had seen employees leaving the building during working time. Also, the human resources department received a report from Operations Manager Billy Smith about employees coming to work late.

The record suggests that Respondent had a policy that employees could not leave the building after clocking in unless they were on break time or had a supervisor's permission, but that some employees were not following it. During a preshift meeting sometime during the first part of September 2013, Operations Manager David Maxey reminded employees of this policy. Human Resources Manager Sara Wright attended this meeting.

Although the record leaves some uncertainty about the exact date of this meeting, Jerry Smith III described a meeting on September 13, 2013 at which both Wright and Operations Manager Maxey spoke. The testimony of Smith III differs from that of Maxey and Wright in two respects. Both Maxey and Wright testified that Maxey was not announcing a new policy but, according to Smith III, Maxey said that "nobody's no longer to come in and punch the time clock and go out and park their cars." However, even if Maxey did say "no longer," those words could simply mean that Respondent had previously not enforced its existing policy but was going to do so in the future.

Additionally, although Smith III quoted Maxey as saying that employees who had clocked in would not be allowed to go out and "park their cars," both Maxey and Wright testified that the prohibition was not limited to employees going to their cars. Considering the length of time between the employee meeting and Smith III's testimony, I do not believe Smith III was trying to quote Maxey exactly but was summarizing the gist of what Maxey had said. Smith III further testified as follows:

> Q. Okay. And when he made that statement, what happened?
>
> A. Employees was asking questions about how they done it in previous times, and she said that from now on--that's when Sara came in and said from now on, you can receive disciplinary actions for doing that.
>
> Q. What happened then?
>
> A. And that was the end of it.

From context, I conclude that Smith III was referring to Human Resources Manager Sara Wright, whose testimony suggests that Maxey did more of the talking. However, Wright's testimony does indicate that at one point during the meeting, she stressed the discipline which could result from a failure to follow the policy:

> Q. Okay. Did you say anything in that meeting about, about discipline?
>
> A. We talked about that it was theft of time and was grounds for immediate termination.

Wright also quoted Maxey as telling employees that "if you clock in and leave the building after work time has started, that it's theft of time. It's grounds for termination." Based on the testimony of Smith III, Wright, and Maxey, I find that employees received clear notice that discipline could result from failure to follow the policy.

Later in September 2013, Wright reviewed video recordings made by a security camera outside the warehouse to determine whether employees were following the policy. She saw that a number of employees had left after the shift starting time and then had returned. However, the video recordings did not reveal whether any particular employee had received a supervisor's permission before leaving the warehouse. Wright asked employees identified in the video to complete questionnaires.

At least 9 employees[12] received such questionnaires, each drafted to refer to a specific date or dates when, according to the video recording, the employee had left the warehouse after the shift began. A questionnaire completed by Jerry Smith included the following questions, with his handwritten answers shown below in italics:

> 1. Did you leave the building after you clocked in on Wednesday, September 18?
> *No!*
>
> a. If so, how long were you outside the building?
> *I did not*
>
> b. If so, why did you leave the building?
> *I did not*
>
> c. Did you have permission to leave the building? If so, from whom?
> *N/A*

However, on the witness stand, Smith III admitted that he had, in fact, left the building after clocking in on September 18, 2013. Smith III testified, in part, as follows:

> Q. BY MR. HEARNE: Wednesday, September 18th is what the question says. Do you remember leaving the building at some time in the morning on Wednesday, September 18th?
>
> A. Yes.
>
> Q. Do you remember about when it was that you went out of the building?
>
> A. It was after the pre-shift meeting.
>
> Q. Why did you leave the building?
>
> A. To turn in a questionnaire that I had received.

The question had asked "Did you leave the building after you clocked in on Wednesday, September 18?" Smith III's "no" answer clearly was incorrect. He attributed his incorrect

[12] The record includes questionnaires completed by the following employees: Jerry Smith (2 questionnaires), Mike Murrell, Tammy Wade, Scott Watkins (2 questionnaires), Kenneth Wright, Alexis Ray, Dennis McLarty, Jennifer Smith, and Tammy Wade.

answer to his understanding of the question: "It was asking did I come in and clock in and go move my car and park it."

Considering the clear wording of the question, Smith's explanation is not particularly convincing. It becomes even less convincing considering that both Wright and Maxey denied telling employees, at the preshift meeting, that the rule only prohibited an employee, after clocking in, from going back to his or her car. In crediting their testimony, I note that there would be no reason for Respondent to have limited its rule to that situation. Any unexcused absence similarly would amount to what Wright called a "theft of time."

Moreover, Smith III's credibility suffers from another problem. Smith testified that he had been granted permission to leave the building on September 18, 2013:

> Q. When you left the building that day, did you let anyone know where you were going?
> A. Yes, I did.
> Q. Who did you talk to?
> A. David Maxey.

However, Maxey testified that he was not in Memphis on September 18, 2013. Respondent introduced a hotel receipt supporting Maxey's testimony that for most of that week, including on September 18, he was in Brentwood, Tennessee, the location of Respondent's corporate headquarters.

The General Counsel's brief argues that Smith III testified "that he had the permission of either Maxey or lead Scott Watkins to leave the building that day." However, the testimony quoted above makes no mention of Scott Watkins. The General Counsel's brief does cite another portion of Smith III's testimony, but that testimony itself falls short of the General Counsel's claim:

> Q. On the 18th, did you--when you left the building, after the morning meeting, did you have permission?
> A. Yes, I did.
> Q. Now, had you ever, prior to this time, had to leave the building but informed the lead what you were doing?
> A. I can't recall.
> Q. Okay. If you had to leave the building and Mr. Maxey wasn't there, who would you talk to?
> A. The lead.
> Q. That's because there was no supervisor? Mr. Maxey was the only--he was the only supervisor. He was a manager, but he was the only supervisor for Browne Halco?
> A. Correct.

In this testimony, Smith III makes a vague claim that he had permission to leave the building on September 18, but he certainly does not identify who gave him permission. Smith's further testimony that if he had to leave when Maxey wasn't there he would ask the lead hardly establishes that on this particular day he did ask a lead. Moreover, Smith III's testimony that he would go to the lead in Maxey's absence cannot be interpreted to mean that he obtained permission from the lead on September 18 because Smith III already had testified, a little earlier in the same direct examination, that he *had* obtained Maxey's permission on this date.

Perhaps I have overlooked some portion of Smith III's testimony on which the General Counsel relies, but I have found nothing in the transcript that would support the assertion in General Counsel's brief that Smith III "stated . . .that he had the permission of either Maxey or lead Scott Watkins to leave the building that day." Rather, I conclude that Smith III testified unequivocally that he had *Maxey's* permission and that testimony is incorrect because Maxey wasn't even in Memphis that day.

Another questionnaire asked Smith whether he left the building after clocking in on September 11, 2013. He replied "No." The video recordings established that Smith III had, in fact, left the building after the start of shift on September 11 and 18, 2013, resulting in Wright's conclusion that Smith had made false statements on both questionnaires. Wright discussed the matter with Senior Employee Relations Manager Shannon Miles, who decided to discharge Smith III.

Respondent discharged Smith III on October 2, 2013, in a meeting attended by Smith III, Wright, and Director of Operations Phil Smith. Smith III testified that when Wright told him that he was being discharged for making false statements, he tried to explain:

> Q. When she explained the reason, did you say anything in response to what Ms. Wright had said?
> A. I said that's not true. I didn't falsify any records.
> Q. Did she say what you falsified?
> A. She explained that I falsified something on the questionnaire about the answers that I had given, and she said like on September 6th. And I told her that you asked the question, did I clock in and leave the building, and I proceeded to tell her I didn't, but she cut me off and said, we're not going to get into all of that; we've made our decision and you're no longer employed here at OHL.
> Q. And did you--were you trying to explain?
> A. Yes, I was.
> Q. Did she let you explain?
> A. I told her it was a misunderstanding, and she cut me off and said we're not going to get into that.

Wright testified that Smith III was not offering an explanation concerning the incorrect statements in response to the questions about leaving the building on September 11 and 18, 2013, but was trying to discuss his leaving the building on September 6, 2013, which was not an issue. Respondent was not discharging Smith III for any statement related to his absence from the building on September 6, 2013. Smith's own testimony, indicates that he was trying to discuss events on September 6, 2013.

Wright's testimony is also consistent with Smith's termination notice. It stated, in part, as follows:

> While conducting an investigation into employees leaving the building after being clocked in and prior to scheduled break times, Jerry was given a questionnaire regarding leaving the building after clocking in. He lied on the questionnaire by claiming that he did not leave the building after clocking in, even though he was seen on video doing so on more than one occasion. He also lied about whether he had left the building, after clocking in, prior to September 18, 2013. Jerry's em-

> ployment is being terminated for violation of the Code of Conduct #29, which states "Failure to cooperate with an internal investigation, including failure to be forthright, open or truthful; withholding information or evidence concerning matters under review or investigation; fabricating information or evidence or conspiring with another to do so.

Wright also testified that Respondent discharged Smith III not because he violated the rule about leaving the warehouse after clocking in, but because he lied in answering the questionnaires. This stated reason is consistent with the discharge notice.

Respondent contends that it could not have discharged all the employees who had violated the rule which prohibited leaving the building after clocking in because should it do so, there would not be enough workers to operate the warehouse. Considering that Respondent was trying to improve service to address its customer's complaints, it presumably would not wish to harm the quality of that service further by discharging employees it needed.

Additionally, Respondent had an important reason to protect the integrity of its internal investigations. Just as the Board depends on truthful testimony in making decisions, so does the Respondent's human resources department. Respondent must take actions in a number of situations which have serious consequences for the affected employees as well as the potential for legal liability. Should Respondent discipline or discharge an employee because it received false information, great harm results.

The General Counsel argues that Respondent's stated reason for discharging Smith III is pretextual and argues that Wright's not allowing him to say more during the discharge interview demonstrates that Respondent was just going through the motions of an investigation to conceal an unlawful motive. As discussed above, I conclude that Smith III was trying to discuss what happened on September 6 rather than September 18, and that this was not relevant to the discharge decision.

Similarly, the government argues that Respondent did not conduct a thorough investigation and thereby demonstrated that the stated reason for discharging Smith III was pretextual. Thus, the General Counsel's brief states that Wright "made no attempt to speak with Smith or seek any clarification of his answers" and argues that the "evidence demonstrates that Respondent did not attempt to perform even a rudimentary investigation concerning the answers Smith provided. . ."

Contrary to the General Counsel's argument, I conclude that Respondent's investigation was not so perfunctory as to justify an inference of pretext. Smith III had been informed, by Maxey and Wright at the preshift meeting, that leaving the building without permission without clocking in could lead to his discharge. He thus had some incentive to deny doing so when he completed the questionnaires.

Moreover, when asked a clear and unequivocal question—did he leave the building after clocking in on September 18—he gave an answer which was equally clear and unequivocal. And false.

Smith III gave false answers to subsequent questions asking how long he was gone from the building and why he had left. The questionnaire then asked whether he had permission to be gone and Smith wrote "N/A."

The evidence before Wright, which included the video recording showing Smith III outside after clocking in and his denials on the questionnaires, demonstrated that his answers were not true. Wright also knew that Smith III was aware that violating the rule could result in discharge, so he had some reason to answer untruthfully. In these circumstances, I conclude that Wright's decision not to investigate further does not suggest the telltale haste of pretext.

In reaching this conclusion, I consider the evidence before Wright when she and Miles made the discharge decision. It may be noted, however, that it would not have helped Smith III if he had told Wright the same thing he said on the witness stand, that Maxey had given him permission to go outside. Wright either would know, or could easily have ascertained, that Maxey wasn't even in Memphis on that day.

The General Counsel also argues that Respondent treated another employee more favorably, by allowing him to complete a second questionnaire, and that such disparate treatment reveals pretext. However, the employee, Scott Watkins, had become concerned that he answered the questionnaire incorrectly and approached management. Wright testified as follows on cross-examination:

> Q. It's a questionnaire for Scott Watkins to be returned to HR no later than 9 a.m. on Monday, September 30th, the same as page 18. Did you leave the building after you clocked in on Friday, September 6th? The exact same question that was asked on page 18 to which he answered no. Now, there's a second questionnaire that says I can't remember what happened on that day. So Mr. Watkins was given a chance to fill out a second questionnaire to explain his answers, wasn't he?
> A. He was and let me tell you why. Because before he turned it in, he repeated told both Mr. Phil Smith and Lisa Johnson that he couldn't remember, he couldn't remember, he couldn't remember, and so he was upset about that certainly and he approached them and said, look, I don't remember that day.

By voluntarily coming to management to express concern about the accuracy of his answers, Watkins had demonstrated candor. Moreover, Respondent did not penalize employees who answered questions by saying "I do not remember." Respondent assumed that might well be true in any given case. In these circumstances, I conclude that Watkins' situation was not similar to that of Smith III and will draw no inference from the disparate treatment.

Evaluating the evidence using the *Wright Line* framework, I conclude that the General Counsel has proven the three elements necessary to make an initial showing. Smith III engaged in extensive protected activity, including testifying in previous Board proceedings. The Respondent, a party to those proceedings, clearly had knowledge of his protected activities. Therefore, I conclude that the General Counsel has satisfied the requirements necessary to raise an inference that Smith III's protected activity was a substantial or motivating factor.

Board precedent holds that if the General Counsel carries that initial burden, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the

same action even in the absence of the protected activity. *Willamette Industries*, 341 NLRB 560, 562 (2004).

This explanation might suggest that by carrying its initial burden, the government has established a conclusive presumption that protected activity is a substantial or motivating factor. Stated another way, the language might imply that once the initial burden has been carried, a respondent is not allowed to challenge or disprove the conclusion that protected activity entered into the decision, but may only argue that the protected activity did not affect the outcome. However, I do not believe *Wright Line* requires a respondent to choke down such a "motivating factor" conclusion without having the chance to chew it and, if possible, spit it out.

For one thing, the word "initial" in the phrases "General Counsel's initial burden" and "General Counsel's initial showing" suggests that the "motivating factor" conclusion is preliminary and tentative and that the issue remains in play. Moreover, to carry its initial burden, the government does not have to show a causal connection between the antiunion animus and the decision to discipline or discharge.

To the contrary, the Board has expressly stated that meeting the initial burden "does not require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined "nexus" between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB 1298 (2014), citing *Encino Hospital Medical Center*, 360 NLRB 335, 336 fn. 6 (2014); *Mesker Door, Inc.*, 357 NLRB 591, 592 fn. 5 (2011).

When causation is the issue to be decided, the absence of evidence of a connection between the animus and the discipline decision carries significant probative weight. It would be odd if a respondent had no opportunity to argue that regardless of whatever animus had been found elsewhere in the company, such animus did not enter into or affect this particular employment decision. In other words, it seems reasonable that at some stage of the analysis an employer may be heard to argue that any existing animus was not a motivating factor here. Such an argument is qualitatively different from the type of argument described in the *Wright Line* explanation, an argument which assumes that animus was indeed present and active in the decision making but was too feeble to do harm.

Because this issue of connection is not considered in determining whether the General Counsel has satisfied the initial three elements, if the resulting inference or presumption that protected activity was a substantial or motivating factor were conclusive, and not subject to rebuttal, then a respondent would have no opportunity to argue the nexus issue. Therefore, I conclude that the inference or presumption is rebuttable.

Here, a number of different factors, considered together, convince me that the protected activities of Smith III were not, in fact, a substantial or motivating factor in Respondent's decision to discharge him. First, no evidence suggests that the union or protected concerted activities of any employee motivated Respondent's decision to tighten enforcement of its existing policy that after an employee clocked in, the employee was not allowed to go outside without a supervisor's permission. Rather, customer dissatisfaction caused the Respondent to take action.

Second, no evidence suggests that Smith III's Union and other protected activity played any part in Respondent's decision to have him complete questionnaires. Rather, when Human Resources Manager Wright reviewed video recordings to determine which employees had left the building after start of shift, the recording showed that Smith III was one of those employees.

Third, based on the video recordings, Respondent asked at least 8 other employees to fill out similar questionnaires.

Fourth, in determining that Smith III had given false answers on his questionnaire, the Respondent relied on objective evidence, the video recordings. At hearing, Smith admitted he had, in fact, left the building after clocking in on September 11 and 18, 2013, even though he had given a "no" answer on the questionnaires.

Fifth, Respondent discharged Smith III pursuant to an established written policy which it cited in the discharge notice. The government has not questioned the bonafides of this policy or argued that Respondent acted inconsistently with it when Respondent discharged him.

Sixth, Respondent had not only a legitimate but also a compelling interest in assuring that employees gave truthful answers during any internal investigation because actions based on those answers could harm innocent employees if the answers were untrue. Likewise, because Respondent's employment actions potentially could result in legal liability, it had a strong business interest in assuring that employees responded truthfully. Moreover, had Respondent failed to take action, it potentially would undermine the effectiveness of the policy in the future.

Seventh, for the reasons discussed above, I have concluded that Respondent did not enforce its policy disparately.

Eighth, there is no evidence, other than the inference arising from the General Counsel's initial showing, that Respondent's managers considered Smith III's protected activities either in selecting him to receive questionnaires or in deciding to discharge him. Similarly, there is no evidence, apart from that inference, which would link either the protected activities of other employees or Respondent's antiunion animus with the decisions to investigate and discharge him.

For all these reasons, I conclude, notwithstanding the inference or presumption resulting from the General Counsel's initial showing, that protected activity was not a substantial or motivating factor in Respondent's decision to discharge Smith. Stated another way, I conclude that the record rebuts the presumption.

This finding, that Respondent *did* make the decision to discharge Smith III in the absence of knowledge of any protected activity, necessarily answers the question of whether Respondent would have made the same decision even in the absence of protected activity. However, were I to reach this issue under the more typical *Wright Line* analysis, the same factors would led me to conclude that Respondent had carried its rebuttal burden.

Accordingly, I recommend that the Board dismiss the allegations related to complaint paragraph 13(m).

Complaint Paragraph 13(n)

Complaint paragraph 13(n) alleges that about November 1, 2013, Respondent discharged its employee Nathaniel Jones. The Respondent admits this allegation but denies that it did so because Jones had assisted the Union and engaged in concerted activities and to discourage employees from engaging in such activities, as alleged in complaint paragraph 13(o). It also denies that the discharge violated the Act.

Jones had minimal protected activities and the record does not establish that he ever signed a union card. He discussed the Union with some other employees and at an employee meeting sometime in the Spring of 2013, asked Director of Operations Phil Smith a question about the Union. Jones mentioned that when he worked for another company, when a union began an organizing drive the employer granted a raise. According to Jones, Smith replied that it was too late for that. Jones also remarked that Respondent was paying its lawyers a lot of money but not giving anything to the employees, to which Smith replied it was too late for that.

On June 14, 2013, Jones received a final warning for failing to wear a seatbelt while operating a forklift. The evidence clearly establishes that Jones did fail to wear a seatbelt on this occasion and the government does not allege the discipline to be violative.[13]

As discussed above in connection with complaint paragraph 13(c), Respondent has a policy requiring employees to wear seatbelts while operating equipment such as forklifts, and even has disciplined a supervisor for violating the policy. The final warning issued to Jones on June 14, 2013, stated, in part, "Nathaniel acknowledged this and immediately put his belt on. This is a very serious violation of OHL Safety Policy."

On October 16, 2013, Jones left his forklift unattended while it was running. The Respondent conducted a thorough investigation, including asking Jones to write out a statement concerning what had happened. The one paragraph statement, signed by Jones and dated October 17, 2013, reads in its entirety as follows:

> On Wed. 10-16 after 4 pm I parked in the main aisle between door 18 & 19. I was talking at row 18 about cardboard issues with some of the pickers. I saw Phil and Tammy walk past the lift. After I walked back to the lift I was told after asking several people that Phil had taken the key because the lift was idling and not turned off.

From the record, I conclude that "Phil and Tammy" refer to Director of Operations Phil Smith and to Lead Tammy Wade. Additionally, Wade's testimony indicates that she, rather than Smith, actually had removed the key from the forklift.

Jones' statement makes clear that he did not dispute the core fact, that he had left the forklift running rather than shutting it down. There is some conflict in the testimony concerning how far Jones went when he walked away from the forklift, but even by Jones' account, he was not close enough to it to have noticed that someone had turned it off and taken the key.

Senior Employee Relations Manager Shannon Miles, whose office is at corporate headquarters in Brentwood, Tennessee, rather than in Memphis, made the decision to discharge Jones after reviewing a number of documents pertaining to this incident, including Jones' statement set forth above. The documents also included notes made by Human Resources Manager Lisa Johnson of her interview with lead Tammy Wade. These notes indicated that after Jones stepped off the forklift, it began to roll, and only then did he set the brake.[14] On the witness stand, Miles explained the decision as follows:

> Q. Now, after reviewing the documents that I just showed you, did you come to a conclusion as to what had occurred?
>
> A. Yes.
>
> Q. What was that conclusion?
>
> A. That Nate Jones had acted in an unsafe manner by leaving his vehicle unattended and running for several minutes. And this was a safety violation. He had already left it without the parking brake on and it started rolling away. Then he—which is another safety violation. Then he left it unattended running and wasn't even looking at it or trying to make sure that it was okay, because he didn't even notice when Tammy, the lead, came up and turned it off and took the keys.
>
> Q. Now, Ms. Miles, did you take into account previous discipline that had been issued to Nate Jones?
>
> A. Yes. He had already been issued a final warning for a seatbelt violation.
>
> Q. Did you make a decision as to what would happen to his employment?
>
> A. Termination.

Miles also testified that she was not aware that Jones had engaged in protected activity. Based on my observations of the witnesses, I credit that testimony.

Analyzing the facts using the *Wright Line* framework, I first consider whether the General Counsel has established Jones engaged in protected activity. Jones discussed the Union with other employees and also asked a manager questions about the Union at an employee meeting. I conclude that the Act protects both of these activities.

In arguing that Jones engaged in protected activity, the General Counsel's brief also states that "during the investigation of Jerry Smith's actions in the break room on August 30, Jones refused to corroborate Phil Smith when asked to do so." This statement refers to events discussed above in connection with complaint paragraph 13(k).

Jones had been in the break room at the time of the encounter between Jerry Smith and Director of Operations Phil Smith,

[13] The General Counsel's brief indicates that Jones received the final warning on June 21, 2013. However, the warning itself is dated June 14, 2013. The record does not indicate that Jones received any further discipline on June 21, 2013.

[14] The General Counsel did not object to the introduction of Johnson's notes of her interview with Wade and that document was received into evidence without restriction. The General Counsel did raise hearsay objections to some other documents reviewed by Miles, and I received those into evidence only to establish what information Miles relied on in deciding to discharge Jones, not for the truth of the matters asserted in them. I consider them here only for that limited purpose.

who later asked Jones what he had witnessed. According to Jones, Phil Smith "was asking me wasn't I in the break room; didn't I hear all that was being said? I said, yeah, what you said. And he was like, like he wanted me to say more but there was nothing more that I could say other than what I heard him say."

Jones' testimony does not suggest that he was refusing to cooperate in the Respondent's investigation of Jerry Smith. Rather, it indicates that he did cooperate, recounting all that he remembered. Even assuming that Jones did not say what Phil Smith hoped he would say, the General Counsel does not explain why such a failure would constitute protected activity. I conclude that it was not.

However, Jones' discussion of the Union with other employees and asking questions about the union campaign at the employee meeting do constitute protected activity sufficient to establish the first of the initial *Wright Line* elements. Because Jones asked the questions in a meeting attended by management, and indeed posed them to a manager, the Respondent clearly had knowledge of this protected activity. Therefore, the record also establishes the second initial *Wright Line* element.

Credible evidence does not establish any direct connection between Jones' protected activity and his discharge and I find none. However, as discussed above, the General Counsel does not have to prove such a nexus to carry the government's initial burden.

Unfair labor practice violations found by the Board in previous recent cases, and which I have found in this case, constitute sufficient proof of animus to satisfy the last of the three initial requirements. Therefore, I conclude that the government has made an initial showing sufficient to create a presumption or raise an inference that protected activity was a substantial or motivating factor in Respondent's decision to discharge Jones.

However, my observations of Senior Employee Relations Director Miles as she testified have led me to believe and credit her testimony. As discussed above, based on that testimony, I have found that Miles made the decision to discharge Jones and that, when she made this decision, she was not aware that Jones had engaged in any protected activity.

Apart from demeanor, other factors lend plausibility to these conclusions. Jones' protected activity was rather minimal, and the part of it known to anyone in management took place at an employee meeting in the spring, thus 4 or more months before Jones' discharge. Although Jones advocated a pay raise for employees, his remarks did not identify him as a mover and shaker in the Union's organizing campaign, which he was not. In other words, Jones' questions at this one meeting were not the sort of protected activity most likely to be reported all the way up to Miles, who worked at the corporate headquarters rather than at the warehouses in Memphis.

Moreover, Miles had placed increased emphasis on safety, resulting in greater enforcement of the rules for operating forklifts and similar equipment. Jones admittedly had committed a rather serious safety violation. These factors are consistent with my decision to credit Miles' testimony. However, there is another factor which may reflect on her credibility.

As discussed below, the record establishes that on several occasions, the Respondent imposed a lesser level of discipline when other employees committed safety infractions which appear to be at least as serious as Jones' violation. Here, I consider whether that evidence reflects on the truthfulness or reliability of Miles' testimony.

From that testimony, I infer that Miles was trying to get tougher on safety violations but that, from her office at corporate headquarters, it was difficult to assure that managers and supervisors in Memphis followed her lead. From the record, it would appear that she did not make all of the disciplinary decisions and that she may not have been aware of some until well after the fact. For example, when asked about warnings issued to two employees, Cedric Williams and Chris Mason, she testified "I didn't recommend these."

Because of Miles' lack of involvement in these instances of discipline, I do not view them as inconsistent with my conclusion that Miles testified truthfully and reliably. Therefore, I credit her testimony. Based on that testimony, I find that Jones' protected activity, of which Miles was unaware, was not, in fact, a substantial or motivating factor in her decision to discharge him.

The General Counsel's brief argues that Respondent had condoned similar incidents but singled out Jones for discipline. It also argues that Respondent treated Jones more severely than it has treated other employees who committed similar infractions of its safety rules. First, I will consider the condonation issue.

The government's argument that Respondent allowed other employees to get away with conduct of equal seriousness to what Jones did relies on Jones' testimony. In the following portion of the General Counsel's brief, the acronym "PIT" stands for "Power Industrial Trucks," a general designation for forklifts, reach lifts, and similar equipment:

> While Jones admitted that some PIT training documents specify that forklifts should be turned of when they were unattended, he testified that he observed other employees engage in this same conduct and that it was condoned within the warehouse. (Tr. 242–243, 257, 260–261). Jones further testified that, when employees have left their forklift unattended and running to use the restroom, they were not able to observe their forklift while inside the restroom whereas he was able to see his forklift from where he was standing speaking with employees. (Tr. 269–270)

Jones' testimony that he saw others engaged in similar conduct might be more credible if he had not also testified that he was able to see his forklift from where he was standing, a claim undermined by other evidence, including other parts of Jones' own testimony. As noted above, if Jones truly had been able to see his forklift, he likely would have noticed when someone walked up, turned it off, and took the key.

By claiming that he was able to see the forklift, Jones was asserting, in effect, that he was in a position to take control of it should it start to move. However, he was so oblivious to the forklift that, after discovering that the key was missing, he had to go around asking other people what had happened.

Additionally, I do not credit Jones' self-serving testimony about the Respondent condoning other, similar violations of its policy. Jones claimed that employees would put the forklift in

park without turning it off and "run in the bathroom and come back out and get on." Certainly, it is possible that some employee, in a moment of particular urgency, took the chance that an accident of vehicular nature would be less likely than a personal one. However, I greatly doubt that such instances were as common as Jones suggests.

Jones testified that he saw an employee, Bobby Hill, fail to turn off his forklift before going to the restroom but that testimony does not establish that any supervisor saw or became aware of it:

> Q. Okay. So when you saw Bobby Hill leaving his lift running when he went into the bathroom, did you ever report that to anyone in OHL management?
>
> A. No, I didn't know it was a violation. I didn't know it was something to be reported.
>
> Q. I'm sorry. Can you describe again the area where Bobby Hill did this? Where in the warehouse is it?
>
> A. We had a bathroom in the front of the warehouse in the office area. We had one in the back of the warehouse.
>
> Q. And where did Bobby Hill leave his forklift running while he went to the bathroom?
>
> A. I would say in the back.
>
> Q. The far end away from the office?
>
> A. Yes.

Thus, Jones admitted that he did not inform any supervisor of this incident and that it took place far from the office. No evidence establishes that a manager or supervisor knew of this incident.

In sum, the General Counsel's condonation argument largely rests on Jones' testimony, which I do not consider very credible or persuasive. However, the government bases its disparate treatment argument on Respondent's personnel records. Some of these documents do describe instances in which employees received lesser discipline for conduct as serious as that of Jones when he left his forklift without turning it off.

For example, on March 20, 2013, two employees, Chris Mason and Cedric Williams, received discipline for violations at least as serious as leaving a forklift unattended, but only received written warnings. The warning issued to Mason described the reason for the discipline as follows:

> On 3–20–13 Chris was operating a forklift and needed to pass a reach truck that was parked in a drive aisle by Cedric Williams. Cedric wouldn't move the reach truck so Chris got on the reach truck and started driving it down aisle 52. Cedric got on the fork lift and reversed it to block Chris from coming up aisle 54. Cedric got off the forklift and proceeded to chase Chris along the Walmart batch line on foot while trying to unplug the battery from the connector on the reach truck. Chris then dismounted the reach truck while it was still in motion.

The warning referred to this conduct as "horseplay," but no matter how characterized, it certainly would appear to pose as much risk as Jones' act of leaving an idling forklift unattended. The warning did not indicate whether either Williams or Mason had previously been disciplined for a safety violation, as Jones had been. However, the first discipline received by Jones for a safety violation—failing to wear a seatbelt while operating a forklift—had been a final warning, which itself was a greater level of discipline than the written warnings issued to Williams and Mason.

Senior Employee Relations Miles did not explain how Respondent determined the level of discipline given to Williams and Mason. The manager who signed the warnings, Mike Nichols, did not testify and the record otherwise does not explain why they did not receive discipline greater than written warnings.

Disciplinary records also establish another instance when Respondent punished an employee less severely than Jones for conduct which appears to have been equally serious. On December 11, 2012, Marcus Crockett received a written warning for the manner in which he was operating a stand-up reach truck, or "SUR." The warning stated:

> On 12/10/12 Marcus Crockett was operating a SUR doing replenishments. The lead Deborah Jones instructed Marcus in regards to the safety guidelines of operating a SUR. I additionally instructed Marcus to follow all safety procedures when operating the SUR which includes blocking off the aisles with cones and ensuring he does not have a hood on his head while operating the lift. On 3 separate occasions after the initial conversation the employee was witnessed operating the SUR with his hood on, once at 10:13 pm, 11:27 pm & again at 12:05 am.

The discipline issued for these violations, fell below discharge and below a final warning. Senior Employee Relations Director Miles, when asked about these violations on cross-examination, said "I would have taken a lot stronger action than that."

Documentary evidence suggests that the customary discipline for operating machinery while wearing a hood was something less than a final warning before April 3, 2013, when Respondent increased the penalty. However, the December 12, 2012 warning indicates that Crockett violated the rule three times after being instructed not to do so. The record does not establish why Respondent did not impose discipline greater than a written warning.

On February 2, 2013, Crockett received a verbal warning for insubordination. Handwritten changes on the warning notice indicate that it had been prepared as a final warning but then was revised to make it only a verbal warning. The record does not establish the reason for this change.

On April 13, 2013, Crockett received a verbal warning for failing to block an aisle so that pedestrians would not use it while he performed a certain task which, presumably, entailed such blocking. The warning notice stated "This is a direct safety violation." Miles also confirmed that earlier, Crockett had received a warning for a similar safety infraction. However, the record does not explain why this further violation did not result in greater discipline than a written warning.

On July 12, 2013, Crockett received discipline for driving his reach truck down a pedestrian-only aisle. Markings on the notice indicate that it began as a final warning but that someone downgraded it to a "second written warning." Handwritten notation, at some points illegible, suggests that whoever down-

graded the warning believed that Crockett did not fully understand the rule.

Although the safety violations committed by Williams, Mason, and Crockett were not identical to the violation for which Jones was discharged, they appear to be of a comparable level of seriousness, if not greater. However, the record does not establish why Respondent imposed lesser discipline.

Under the typical *Wright Line* analysis, once the government has made an initial showing sufficient to raise a presumption that protected activity was a substantial or motivating factor in the discharge decision, an employer attempting to rebut that burden will introduce into evidence its established work rules and will present evidence that it had discharged other employees for similar violations. Here, the Respondent has introduced such work rules and the record leaves no doubt that it takes safety violations seriously. However, documentary evidence also establishes that discipline varied considerably for presumably equivalent violations.

In addition to this documentary evidence, some testimony suggests that Respondent's management played favorites. For example, during Jones' cross-examination, Respondent asked him about the final warning he had received in June 2013:

> Q. BY MR. BODZY: How many more safety violations do you think you needed to incur before being terminated from OHL?
>
> A. Well, I believe it depended. Had I been part of the in crowd, it never would have even been considered a violation.

The existence of an "in crowd" in the warehouse sheds light on an otherwise inexplicable fact. Senior Employee Relations Manager Miles, sitting in her office at corporate headquarters, decreed a get tough policy on safety violations, but at the warehouse, managers applied it unevenly. In view of this favoritism, I conclude that Respondent has not carried its burden of showing that it would have taken the same action even in the absence of protected activity.

This conclusion appears to collide with the factual finding, discussed above, that the person who made the discharge decision did not know about Jones' protected activity and therefore did not take such activity into account in deciding to discharge him. However, I believe that the apparent conflict is illusory.

The Act does not make it unlawful for management to "play favorites," so long as that favoritism does not discriminate against an employee because the employee engaged in activities protected by the statute or to discourage others from engaging in such activities. So my conclusion that warehouse managers played favorites does not amount to a finding that they played favorites in violation of the Act.

However, regardless of the cause of the favoritism, any evidence of playing favorites undermines an employer's effort to show that it would have imposed the same discipline in any case, even in the absence of protected activity. The *Wright Line* test requires a respondent to show that it *would* have, not merely that it *could* have taken the same action.

To a great extent, an employer meets this significant rebuttal burden by showing that in the past, similar infractions have led to the same discipline. However, both unlawful discrimination and lawful favoritism will produce the same kind of inconsistencies defeating the rebuttal effort.

In a *Wright Line* analysis, the government's initial showing shifts to a respondent the burden of proceeding, but the burden of proof remains at all times on the government. In determining whether the General Counsel has carried this ultimate burden, it is appropriate to consider whether the *Wright Line* test produced a "false positive" for the reason discussed above.

Here, I give controlling weight to the factual finding that Respondent's decision maker neither knew about nor considered Jones' protected activities when she decided to discharge him. That factual finding rested on Miles' testimony, which I credited because she impressed me as being a truthful and reliable witness. Moreover, no evidence contradicted her claim that she was unaware of Jones' protected activity.

This factual finding, that Respondent's decision-maker did not consider protected activity, necessarily answers the question of whether it would have taken the same disciplinary action in the absence of protected activity. Therefore, I conclude that Respondent did not violate Section 8(a)(1) and (3) but discharged Jones for cause, within the meaning of Section 10(c) of the Act.

Accordingly, I recommend that the Board dismiss the allegations related to complaint paragraph 13(n).

Complaint Paragraph 14

Complaint paragraph 14 begins a series of allegations relating to the Union's status as exclusive bargaining representative. On May 24, 2013, the Board certified the Union as exclusive representative of the employees in the bargaining unit described in complaint paragraph 14(a).[15] As discussed above, events unrelated to this case resulted in the Board setting aside that certification and ultimately issuing a new certification of representative in *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921 (2014).

The Board based the new certification on the same election which had resulted in the previous certification. Although the Supreme Court's *Noel Canning* decision, which invalidated the appointments of some Board members, necessitated the new certification, that decision did not change in any way the underlying fact evidenced by the certification, that a majority had selected the Union to represent them. Therefore, I conclude that at all times since May 24, 2013, the Union has been the exclusive bargaining representative in the unit described below.

Complaint paragraph 14(a) alleges that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3,

[15] The General Counsel's brief, at footnote 3, argued for the severance of the complaint's 8(a)(5) allegations because of the Board's setting aside of this certification. However, in view of the Board's subsequent action in *Ozburn–Hessey Logistics, LLC*, 361 NLRB 921, I will consider those allegations.

> quality assurance coordinators, returns clerks, and team leads employed by the Employer at the Memphis, Tennessee facilities located at: 5510 East Holmes Road; 5540 East Holmes Road, 6265 Hickory Hill Road, 6225 Global Drive, 4221 Pilot Drive, and 5050 East Holmes Road.
>
> Excluded: All other employers, including, office clerical and professional employees, guards, and supervisors as defined in the Act.

Although Respondent denied this allegation, the Board found that it was appropriate when it certified the Union in *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921. I conclude that the General Counsel has proven the allegations in complaint paragraph 14(a).

The Respondent admitted that the Board certified the Union as the exclusive representative of the employees in this unit. Based upon that admission and on the Board's decision in *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921, I find that the General Counsel has proven the allegations raised by complaint paragraph 14(b), except that the correct date of the certification is November 17, 2014.

Complaint paragraph 14(c) alleges that at all times since May 24, 2013, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit. Respondent has denied this allegation. However, for the reasons discussed above, I find that the government has proven this allegation.

Motions Related to 8(a)(5) Allegations

As discussed above, the Board's May 2, 2013 decision in *Ozburn-Hessey Logistics, LLC*, 359 NLRB 1025 resulted in the May 24, 2013 certification of the Union as the employees' exclusive collective representative. More than a year later, the Supreme Court, in *Noel Canning*, ruled that the President's appointments of certain Board members had not complied with the Constitution. Because these appointments were invalid, their actions as Board members presumably lacked the force of law. The Board therefore withdrew the certification of representative.

The Supreme Court issued its *Noel Canning* on June 26, 2014, and the Board set aside the certification the next day, both events occurring after the hearing in the present case opened but before it closed. Because the complaint's 8(a)(5) allegations rested on the floor created by the May 24, 2013 certification, the abrupt disappearance of that floor did not go unnoticed, particularly by the parties standing on it.

The Respondent moved to dismiss the alleged violations of Section 8(a)(5) of the Act because there was no certification of representative. The General Counsel, opposing the motion to dismiss these allegations, moved instead for the allegations to be severed from the other complaint allegations pending the issuance of a new decision by the Board.

At the time the hearing ended, and when counsel filed post-hearing briefs, no certification of representative existed. On November 17, 2014, the Board issued a new Decision, Order, and Certification which expressly adopted and incorporated by reference both its earlier May 2, 2013 decision and the subsequent May 24, 2013 certification of representation. The Board stated, in part:

> The [May 2, 2013] Decision, Order, and Direction adopted, inter alia, the administrative law judge's resolution of 10 challenged ballots. Having also adopted that resolution herein, our normal practice would be to direct the Regional Director to open and count the challenged ballots, to prepare and serve on the parties a revised tally of ballots, and to issue an appropriate certification. However, the Regional Director has already performed these ministerial tasks in response to the Board's original Decision, Order, and Direction, and we see no purpose to be served by requiring the Regional Director to repeat them. Thus, the revised tally of ballots that issued on May 14, 2013, accurately presents the results of the election, and the Certification of Representative issued by the Acting Regional Director on May 24, 2013, is based upon the valid votes cast. The revised tally shows 169 for and 166 against the Petitioner, with no challenged ballots. There is no question that a majority of valid ballots was cast for the Union, and there is no question that the certification issued by the Acting Regional Director is substantively correct. Nevertheless, in an abundance of caution and in an effort to avoid further litigation that would only serve to further delay this matter, we will issue a new Certification of Representative.

361 NLRB 921, 921.

In view of this action, I will deny both Respondent's motion to dismiss the 8(a)(5) allegations and the General Counsel's motion to sever. In particular, I note the Board's holding that there "is no question a majority of valid ballots was cast for the Union, and there is no question that the certification issued by the Acting Regional Director is substantively correct."

Additionally, it may be noted that a union's authority to serve as the employees' exclusive representative flows from the employees' choice, as determined by the election. The subsequent certification essentially amounts to official confirmation that employees had made this choice, that the election was fair and the bargaining unit appropriate. The Board's action, setting aside the certification more than a year later for reasons having nothing to do with the parties or their actions, does not change the underlying facts.

Therefore, justice will be served by treating the May 24, 2013, as valid from that date until the Board set it aside.

Complaint Paragraph 15

The subparagraphs of complaint paragraph 15 allege a number of changes in various terms and conditions of employment. Respondent's answer admits some of these alleged changes but denies others. However, in each instance, the Respondent denies that the alleged change constituted a mandatory subject of bargaining, as alleged in complaint paragraph 15(n).

The alleged changes all concern matters directly relating to wages, hours, and other terms and conditions of employment. In each instance, there can be little doubt that the change would constitute a mandatory subject of bargaining if it effects are material, substantial, and significant change in terms and condi-

tions of employment. *Ead Motors Eastern Air Devices, Inc.*, 346 NLRB 1060 (2006); *Millard Processing Services*, 310 NLRB 421, 425 (1993); see also *Peerless Food Products*, 236 NLRB 161 (1978). Therefore, a conclusion below that a particular change is material, substantial and significant also constitutes my conclusion that the General Counsel has proven that the change in question constitutes a mandatory subject of collective bargaining.

Complaint paragraph 15(o) pertains to each of the allegations alleged in complaint paragraphs 15(a) through (m). It alleges that in each of these instances, Respondent made the change without prior notice to the Union and/or without affording the Union an opportunity to bargain with Respondent with respect to this conduct and/or the effects of this conduct, and without first bargaining with the Union to a good-faith impasse. Respondent answers this allegation as follows:

OHL admits the allegations in Paragraph 15(o) of the Sixth Consolidated Complaint insofar as OHL has not given notice to the USW of any changes or bargained to impasse, but OHL denies that it is under any legal obligation to do so.

As discussed above, on November 17, 2014, the Board certified the Union as the employees' exclusive bargaining representative. *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921. Therefore, there is no doubt that Respondent does have a legal obligation to recognize and bargain with the Union.

Board precedent has long established that an employer acts at is peril by changing terms and conditions of employment while its objections to an election are pending. *Bloomfield Health Care Center*, 352 NLRB 252 (2008). Accordingly, in each of the allegations discussed below, a finding that Respondent made the alleged change and a conclusion that it was material, substantial, and significant will lead to the further conclusion that Respondent's admitted failure to give notice to the Union and bargaining to impasse will result in the further conclusion that Respondent violated Section 8(a)(5) and 8(a)(1) of the Act.

The following chronology may be helpful in considering the allegations:

June 16, 2010	The first election. The parties later agreed to set it aside and conduct a second election.
July 27, 2011	Second election.
May 2, 2013	The Board orders the ballots counted.
May 14, 2013	A revised tally of ballots shows 169 votes for the Union and 166 for the Respondent.
May 24, 2013	Board issues Certification of Representative.
June 27, 2014	Board sets aside the May 24, 2013 Certification.
November 17, 2014	Board issues new Certification of Representative.

Complaint Paragraph 15(a)

Complaint paragraph 15(a) alleges that about January 2012, a more exact date being unknown to the General Counsel at this time, Respondent increased its matching contribution to employee contributions to its employee 401k retirement plan. Respondent's answer admits this allegation, although it denies that the change constituted a mandatory subject of collective bargaining.

Complaint paragraph 15(o) alleges that Respondent engaged in this conduct without prior notice to the Union and/or without affording the Union an opportunity to bargain with Respondent with respect to this conduct and/or the effects of this conduct, and without bargaining with the Union to a good-faith impasse. Respondent's answer admits that it has not given notice to the Union of any changes or bargained to impasse, but Respondent "denies that it is under any legal obligation to do so."

Clearly, contributions to employees' retirement accounts fall within the definition of "wages, hours and other terms and conditions of employment." These contributions comprise part of each employee's total compensation and certainly constitute a mandatory subject of collective bargaining.

Respondent argues that it had no duty to notify and bargain with the Union before implementing this change in the absence of a certification that the Union was the employees' exclusive bargaining representative. Thus, the Respondent's brief states:

> It is axiomatic that OHL has no duty to bargain with the USW, to provide it information, or to refrain from unilateral changes in the absence of a valid certification. As the Board noted in *Drukker Communications*, 258 NLRB 734 (1981), "[a] unilateral change is merely an inchoate violation during the pendency of election objections, and does not mature into an unfair labor practice *until certification*." Id. at 734. (emphasis added). [Italicized in Respondent's brief.]

The unilateral change described in complaint paragraph 15(a) took place in January 2012, well after a majority of eligible voters had selected the Union in the July 27, 2011 election, but before the Board's resolution of objections led to a revised tally of ballot and certification of the Union. In other words, the unilateral change took place while objections were pending.

As noted above, Board precedent has long established that an employer acts at is peril by changing terms and conditions of employment while its objections to an election are pending. *Bloomfield Health Care Center*, above; *Alwin Mfg. Co., Inc.*, 326 NLRB 646 (1998) citing *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

Citing *Drukker Communications*, the Respondent argues that a unilateral change does not mature into an unfair labor practice until the Union's certification. However, any gestational period ended with the Board's November 17, 2014 Certification.

The Respondent also has raised the affirmative defense that the charge is time barred by Section 10(b) of the Act because the change took place in January 2012 but the initial charge in this proceeding was not filed until October 26, 2012. Respondent's argument has merit. Although I would otherwise recommend that the Board find a violation, I conclude that Section 10(b) constitutes a bar.

Therefore, I recommend that the Board dismiss the allegations related to complaint paragraph 15(a).

Complaint Paragraphs 15(b) and 15(e)

Complaint paragraph 15(b) alleges that about "January 2013, a more exact date being unknown to the General Counsel at this time, Respondent implemented a mandatory exercise and stretching program for certain employees in the HP account." The Respondent denies this allegation.

The wording of complaint paragraph 15(e) mirrors that of paragraph 15(b) except for the date. It alleges that about "May 2013, a more exact date being unknown to the General Counsel at this time, Respondent implemented a mandatory exercise and stretching program for all employees in the HP account." The Respondent also denies this allegation.

Notwithstanding that both paragraphs include the phrase "a more exact date being unknown to the General Counsel at this time," the allegation of the same unilateral change at the same location on two different dates, 4 months apart, poses something of a paradox. The complaint does not claim, the record does not suggest, and the General Counsel's brief does not argue that the Respondent implemented an exercise program in January 2013, rescinded it and then implemented it again in May. Absent such an intervening event, the Respondent could not have implemented the alleged change in January and then done so again in May because the second time would not be a change at all. Rather, it would be a continuation.

The General Counsel's witnesses differ greatly on when the change took place. That might explain why the complaint has two separate allegations, but I conclude that there only could have been one change. Therefore, these allegations will be considered together.

The General Counsel presented a number of witnesses who testified that management instituted a mandatory regimen of stretching exercises. Some of them also testified that the exercises including "jumping jacks." The witnesses uniformly testified that initially, employees could choose whether or not to participate but that at some point it became mandatory. Their uncontradicted testimony on this point clearly establishes that Respondent changed the program from voluntary to mandatory at some point and I so find.

As noted above, it is difficult to pinpoint when this change occurred. The witnesses did not provide consistent testimony either on when the program began or when it became mandatory. For example, employee Shawn Wade testified:

> Q. During what period of time was it that employees had the option whether to do these exercises or could choose not to?
> A. Let's see, '13.
> Q. Was that earlier than 2013 or was that at—
> A. It was early.
> Q. —an early point in 2013?
> A. It was earlier in 2013.
> Q. Prior to? So, during 2012?
> A. Right, right.
> Q. Do you recall if, at any point, that practice changed with regard to the exercises?
> A. It's about like, I'll say like January or February of '13.

Wade's testimony contrasts with the following testimony of employee Dwayne Nelson:

> Q. When did that begin, to the best of your recollection?
> A. Best of my recollection, it began in late '13, to the best of my recollection.
> Q. Late 2013?
> A. It had to be late 2013.
> Q. Why did it have to be late 2013?
> A. Well, earlier, we wasn't doing anything like that. We changed about the same time we changed the time of the shifts. I used to work 3:00 to 11:00. Then we start working at 11:15 to 11:00 p.m and it was during that time that we start, a little before that time, we started taking exercise.

Nelson thus expressed some degree of certainty regarding the date (it "had to be late 2013") and gave an explanation for that certainty. However, it would increase my confidence in his recollection if some other employee provided similar testimony about the date. Wade did not, and neither did employee Anita Wells, whose testimony agreed neither with Wade nor Nelson:

> Q. Okay. And for how long had it been a voluntary program?
> A. Maybe a few months. Three or four months. But they kept warning that eventually it's going to be implemented and everybody will have to do it. Because a lot of people didn't do it. They just stood there and watched everybody else stretch.
> Q. And I'm sorry, what was the time frame that you recall it becoming mandatory.
> A. I'd say within three months of them first starting it. Three to four months.
> Q. Okay. Could you give me a month, approximate time frame?
> A. April—around April.

Another employee witness, Teresa Pressman, offered still another date. She testified:

> Q. And do you recall when that practice started?
> A. I want to say like last July or August of 2013.

In sum, four different employee witnesses all agree that Respondent instituted a mandatory exercise program, but each gives a significantly different date. Rather than picking one of those dates, the complaint alleges two different unilateral changes, the first in January—which is consistent with Wade's testimony, and the second in May, which is closer to Well's April date than to Pressman's August date, but still in between them.

Although the supervisor supposedly responsible for the exercise program, Stacy Deal, gave testimony, it does not refer to the exercise program and therefore sheds no light on when the program began. Not mentioning the program at all, Deal certainly did not contradict the testimony of the employee witnesses concerning it.

As noted, the employee witnesses agree that Respondent began requiring employees to participate in exercises and that this

requirement was new. Crediting that testimony, I find that Respondent did make this change. Respondent has admitted that it did not notify or afford the Union an opportunity to bargain before making the changes alleged in complaint paragraph 15, so I further find that the Respondent acted unilaterally.

Although it approaches guesswork, I conclude that Respondent most likely made the exercise program mandatory sometime in the spring or summer 2013. Now, I turn to whether the unilateral implementation of the mandatory exercise program violated the Act.

The Respondent's brief raises a number of arguments. It cites authority for the principle that "there cannot be an unlawful unilateral change where the General Counsel fails to demonstrate the existence of an established past practice or understanding. *See Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *Allied Med. Transp., Inc. & Transp. Workers Union of Am., AFL–CIO*, 360 NLRB 1264 (July 2, 2014)." However, the record does establish a past practice of not requiring employees to participate in an exercise program.

The Respondent also argues that a change "will not constitute an unlawful unilateral change, when it narrowly addresses a newly arising condition encompassed by a preexisting rule." However, the record does not establish that Respondent began requiring employees to do exercises because of some newly arising condition. It also does not establish that such a newly arising condition was encompassed by an existing rule.

The Respondent also cites the well-established principle that, to be unlawful, a unilateral change must be a material, substantial, and significant one affecting the bargaining unit employees' terms and conditions of employment. Thus, the Respondent appears to argue that requiring employees to do some stretching exercises and "jumping jacks" does not materially, substantially or significantly alter the employees' terms and conditions of employment.

However, the General Counsel contends that the imposition of this regimen increases the employees' physical job duties and that a change which results in an increase in job duties will constitute an unlawful unilateral change. *Bundy Corp.*, 292 NLRB 671, 678 (1989). It can hardly be disputed that requiring employees to do exercises, including "jumping jacks," does add a rather onerous new task to existing job duties, and I conclude that this change is material, substantial and significant.

Respondent effected this change after the election and while objections to the election were pending. It acted at its peril. I conclude that making this change without notifying the Union or affording it meaningful opportunity to bargain about the decision and its effects, Respondent violated Section 8(a)(5) and (1) of the Act.

Complaint paragraph 15(e) alleges that the violation took place in May 2013, which appears to be closer to the actual time than the January 2013 date alleged in complaint paragraph 15(b). Therefore, I recommend that the Board dismiss complaint paragraph 15(b) and find that the Respondent violated Section 8(a)(5) and (1) of the Act by the conduct alleged in complaint paragraph 15(e).

Complaint Paragraphs 15(c) and (p)

Complaint paragraph 15(c) alleges that about April 2013, Respondent implemented the Kronos timekeeping system. Respondent denies this allegation.

Complaint paragraph 15(p) alleges that as a result of Respondent's conduct described in paragraph 15(c), on May 13, 2013, Respondent discharged its employee Lauren Keele. Respondent answered this allegation as follows: ""OHL admits the allegations in Paragraph 15(p) of the Sixth Consolidated Complaint insofar as it terminated employee Lauren Keele on or about May 13, 2013; OHL denies that her discharge resulted from the change to the Kronos timekeeping system."

The lawfulness of Respondent's admitted discharge of Keele depends on the lawfulness of Respondent's implementation of the Kronos computerized time and attendance record keeping system. If Respondent acted lawfully in implementing this system, then the allegation that Keele's discharge resulted from the unlawful implementation of that system must fail as well.

Complaint Paragraph 15(c)

Notwithstanding the Respondent's denial of the allegations raised by complaint paragraph 15(c), the record clearly reflects that Respondent did replace its previous timekeeping equipment with a new system called Kronos, and the exhibits include instructions on how to operate this system. An internal human resources email indicates that the Kronos system replaced the previous "Unitime" system on April 22, 2013.

The record includes extensive operating instructions for the Kronos system and Respondent does not dispute its installation. Rather, Respondent's brief argues that the change does not rise to the level of "material, substantial and significant."

The General Counsel's brief does not explain why the replacement of one timeclock with another would constitute such a change in working conditions. Instead, the brief focuses on difficulties experienced by employees as they learned the new system. It states, in part:

> Whitley testified to difficulty operating the Kronos system and that she had to seek the assistance of supervisor Chris Finley to provide her with instructions on how to use the Kronos system, especially for Personal Time Off (PTO) requests. (Tr. 391-393). Whitley says there was no training in Waterpik on how to operate the Kronos time clocks. (Tr. 393). The only materials provided was a booklet placed near the time clock, which employees could review if they were having trouble with the time clock. (Tr. 393). Whitley and Herron testified they did not see Sara Wright at the time clock used by the Waterpik employees at any time during the week following the implementation of the Kronos system. (Tr. 430, 1054).
>
> Wright testified that materials on how to operate the Kronos time clocks were placed by all the time clocks in the buildings and employees were given a demonstration on how to operate the time clocks. (Tr. 1448). Wright admitted that the Unitime system in place previously did not allow employees to request PTO or any other functions beyond clocking in and out and registering a transfer to a different account. (Tr. 1459-1460). Respondent witnesses claim that training was conducted on the use of the Kronos system in all the accounts but it failed to produce records

> showing that training was actually conducted in any account other than the Yazaki account. (Tr. 1462-1463). Quinn Farmer claims that the switch to the Kronos system was discussed with employees in the pre-shift meeting for the Waterpik account in the weeks leading up to the switch and employees were told that there was a booklet posted next to the Kronos time clocks if they had questions or problems with the new time clocks. (Tr. 1542-1543). Farmer said he also made himself available in the first days after the implementation of the Kronos system to employees who had questions or problems operating the new time clocks. (Tr. 1543-1544).

Thus, the General Counsel appears to argue not that the new timeclock itself constituted a significant change in working conditions but rather that Respondent's management did not adequately train employees in the use of the new system. Certainly, the task of learning the new system would expand the employees' job duties briefly, but it doesn't necessarily follow that the new timeclock caused any lasting change in the employees' work.

Theoretically, replacing an older technology with newer might well have such an impact. For example, the teamsters who once drove horses had different skills from those of Teamsters who now drive tractor-trailers. The switch from 16 hooves to 18 wheels would indeed seem material, substantial and significant.

To suspect that replacing one timeclock with another would not amount to such a significant change does not ignore that it could produce stress. Anyone who has experienced frustration with new technology, which is to say almost anyone at all, will be sympathetic to the frustrations experienced by employees dealing with refractory smart devices. Yet a new piece of equipment can be a source of frustration without constituting a material, substantial and significant change.

Suppose, for example, that instead of a new timeclock system, the new equipment were a forklift which performed the same function as the old forklift but had unfamiliar controls which had to be learned. It seems unlikely that the new forklift would effect a material, substantial, and significant change. However, in the case of the timeclock, the government argues that the Kronos system did more than replace its predecessor. The General Counsel's brief states:

> [T]he implementation of the Kronos timekeeping system on April 22, 2013 went beyond the mere change to a different type of time clock. The change to the Kronos system added numerous functions which were not available under the old Unitime timekeeping system, including making requests to use PTO [paid time off] and checking messages to confirm whether PTO requests were granted. With these increased functions, the manner of operation also changed as certain buttons common under the old timekeeping system were eliminated and new buttons were added. The employee training materials for the Kronos system numbered 50 pages in total but employees were provided limited training on the operation of the system. In addition, because the Kronos system changed the manner in which supervisors reviewed and communicated with employees about a request to use PTO, employees have been denied the use of PTO in situations where employees previously would have either been granted use of PTO or would have been informed in advance that the request to use PTO was being denied . . . In this case, the change in timekeeping systems went beyond a change in the mere method for employees to clock in and placed substantial new demands on employees in the operation of the system and the functions for which employees use the timekeeping system.

The General Counsel thus identifies a number of specific asserted changes, some of which will be discussed further below in connection with other allegations. For example, employees formerly requested paid time off (PTO) by submitting a paper form; using the Kronos system they do so electronically. Likewise, instead of discussing a request for paid time off orally with a supervisor, the employee now receives notification electronically. Such changes are taking place throughout society and generally seem to impose little burden. Here, it appears, employees do have to use the Kronos machine, which some dislike, to communicate about the request for time off. However, the record does not establish that such change is material, substantial or significant.

The General Counsel also argues that under the Kronos system "certain buttons common under the old timekeeping system were eliminated and new buttons were added." Learning the new buttons requires considerable study and more training, the government argues, than the employees have been given. The Respondent contends that it has provided sufficient training, but even assuming for the sake of analysis that it had not, the actual complaint would relate more to the failure to provide training, which has not been alleged to be violative, rather than to a change in working conditions.

Although the General Counsel contends that the Kronos system "placed substantial new demands on employees," the evidence does not prove the existence of any new substantial or significant burden. There appear to have been some initial problems, discussed below, but individual mistakes or misunderstandings do not prove that the change was material, substantial, or significant.

In sum, I find that the General Counsel has not established that Respondent's replacement of its old timekeeping equipment with the Kronos system constituted a material, substantial, and significant change in terms and conditions of employment. Therefore, I recommend that the Board dismiss the allegations related to complaint paragraph 15(c).

Complaint Paragraph 15(p)

Having concluded that Respondent did not violate the Act by implementing the Kronos timekeeping system, I further conclude that its discharge of Lauren Keele did not violate the Act.

Nonetheless, for completeness, a brief discussion of this allegation may be warranted. The General Counsel argues that the Kronos system was more complicated that the "Unitime" system it replaced, and that Respondent did not provide adequate training to employees on its use.

As described above in connection with complaint paragraph 13(g), Respondent assesses points for attendance infractions such as tardiness and unexcused absences from work. The

Respondent discharges an employee when that person's total exceeds 12.

Keele had already accumulated 12 points when, on April 30, 2013, she returned from lunch and tried to clock back in using the Kronos system, which then had been in operation only about 8 days. The General Counsel argues that, on this occasion, Keele pushed the wrong part of the touch screen, resulting in the appearance of another screen which was not the correct one. Then, in trying to clear this screen, Keele again pushed the wrong button or touched the screen at the wrong place. By the time the Kronos machine logged her in, Keele was a minute late. The additional point for being tardy increased her total points to 13, resulting in her discharge.

Because I have concluded that the Respondent lawfully implemented the Kronos system, it is not necessary to ponder to what extent, if any, the machine contributed to Keele's discharge. Rather, I recommend that the Board dismiss the allegations raised by complaint paragraph 15(p).

Complaint Paragraph 15(d)

Complaint paragraph 15(d) alleges that about April 2013, the Respondent changed its method for employees to request the use of personal time off. The Respondent denies this allegation.

To prevent confusion, it may be noted that complaint paragraph 15(f) presents a similar allegation. It alleges that about June 2013, Respondent implemented a requirement that employees provide advance notice of 24 or 48 hours when requesting the use of personal time off. Confusion might arise because the portion of the General Counsel's brief which discusses the paragraph 15(d) allegations also mentions the 24-hour advance notice requirement which is the subject of paragraph 15(f). For clarity, that portion of the General Counsel's brief will be quoted below.

To establish the allegations in complaint paragraph 15(d), the General Counsel relies on the testimony of Nathaniel Jones. However, Jones testimony leaves uncertainty as to when the events he described took place. It is possible, perhaps likely, that they took place after the change which complaint paragraph 15(f) alleges occurred in June 2013. However, because the government's brief cites these events in connection with complaint paragraph 15(d), they will be discussed here.

Previously, to request paid time off, an employee completed a form (in government parlance, a "leave slip") and gave it to his or her supervisor. Under the new Kronos system, an employee swiped his or her timecard across a scanner and entered the dates and times for the requested time off. The record does not establish that swiping a time card and entering the information would be any more onerous than filling out a paper form.

Once the employee had entered the information, the Kronos system transmitted it to the supervisor's computer. After reviewing the request, the supervisor either granted it or denied it by entering information into the computer. The employee ascertained whether the requested had been granted by going to a Kronos terminal to check for messages. Although this method seems a bit more impersonal than speaking with the supervisor face to face, it does not appear to place on the employee any additional significant burden.

However, the government cites the experience of one employee, Jones, to support its argument that the Kronos system imposed a substantial new burden on employees. The General Counsel's brief stated:

> Nathaniel Jones testified that, following the implementation of the Kronos timekeeping system, he made a request to use PTO the following day to attend a function at his child's school. (Tr. 227-228). After Jones did not receive a response to his request later on the day he made the request, he attempted to contact his manager, Maxey, about his request to use PTO the following day. (Tr. 228). Jones said he did not get a response from Maxey, but did not report to work the next day and attended the program at his child's school. (Tr. 228).

Before proceeding further with the General Counsel's argument, it may be noted that Jones decided not to report to work even though he had not received approval for the absence. Jones' decision to be absent without approval may reflect an expectation that his supervisor would grant approval or possibly a belief that his supervisor really had granted approval but that the Kronos system was malfunctioning and failing to inform him of that approval. If Jones had assumed that the machine was working properly, he would have concluded, reasonably, that the absence of any notice of approval meant that his request had not been approved.

The General Counsel's brief describes what then happened to Jones to support the government's argument that the Kronos machine imposed a new material, substantial and significant burden on employees. However, when Jones took off work without having received any notice of approval, it is difficult to understand how the timekeeping system could be faulted. The General Counsel's brief continues as follows:

> Jones said that he spoke with manager Billy Smith a few days later about his PTO request, and Smith informed Jones that his request had been denied. (Tr. 228). Jones told Billy Smith that he tried to call Maxey about his PTO request and Smith responded that Maxey had been out of town for training. (Tr. 228). Jones testified that he had not been informed that Maxey was not at work the day he made the request or who would be reviewing the PTO requests in Maxey's absence. (Tr. 228). Jones said he asked Smith why his request was denied, and Smith said that the PTO request had not been made 24 hours in advance. (Tr. 228). Jones said he was assessed attendance points for the day he took off work. (Tr. 229).

Although the General Counsel further argues that Jones never received notification, through Kronos, that his request had been denied, that does not overcome the fact that he also never received notification that it had been granted. The government has not contended that Respondent told employees that they could take a day off unless they received word that the request had been denied. In fact, the Respondent's written policy, effective January 1, 2013, provided the opposite:

> Employees must receive prior approval from their manager by completing a PTO Request Form before taking PTO.

Similar language also appeared in an earlier version of the PTO policy dated January 1, 2010. Although the Kronos system substituted an electronic PTO Request Form for a paper version, it did not change the requirement that the employee receive prior approval.

Therefore, I conclude that the change to the Kronos time system did not cause Jones to take off work without first receiving approval. His decision to take off work without receiving such permission amounted to a gamble.

Certainly, based on Jones' past experience, it may have appeared a pretty safe bet. Jones testified that never before had the Respondent denied his request for paid time off. However, the change which resulted in the denial of his request was not the requirement that he submit this request through the Kronos system, rather than on paper. Rather, it was a new policy requiring a request to be made 24 hours in advance.

To be sure, the 24-hour notice requirement does appear to be related to the new Kronos system. Indeed, the document informing employees of this policy explained that the new Kronos system made it necessary. However, the complaint treats the change in method for requesting leave and the 24-hour reporting requirement as two separate allegations and the General Counsel's brief does likewise. So will I.

If Jones' attendance points for an unexcused absence can be attributed to any unilateral change, it is not the requirement that he request leave through the Kronos system rather than on paper. Rather, it was the implementation of the 24-hour notice requirement, which made his request untimely.

Therefore, I do not conclude that replacement of the old timekeeping system with the Kronos system added any material, substantial, or significant burden to employees' work duties or resulted in any material, substantial, or significant change in working conditions. I recommend that the Board dismiss the allegations relating to complaint paragraph 15(d).

Complaint Paragraph 15(f)

Complaint paragraph 15(f) alleges that about June 2013, Respondent implemented a requirement that employees provide advance notice of 24 or 48 hours when requesting the use of personal time off. Respondent denies this allegation.

At some point, the Respondent issued to employees a document titled "Policies Reminders Acknowledgement" which included, among other work rules, the following:

> PTO
>
> Request submitted 48 hours in advance; this is a must with our new Kronos Time keeping system.

This document does not bear a date of issuance. However, the copy in evidence includes the signature of an employee who received it along with the date 4–25–13, which was only 3 days after the April 22, 2013 change to the Kronos timekeeping system. Based on this evidence, I find that the change took place between April 22and 25, 2013, rather than in June.

Additionally, I find that this advance notice requirement did constitute a change from the working conditions existing before the announcement. This conclusion flows from the absence of such a requirement in previous documents describing the Respondent's paid time off policy, and on the explanation that "this is a must with our new Kronos Time keeping system." In other words, the new system required the new policy.

Jones' testimony refers to a 24-hour advance notice requirement but the document announces a 48-hour rule. Human Resources Manager Wright testified that individual warehouse managers decided whether the required advance notice would be 24 or 48 hours. Further, she claimed, at least by implication, that Respondent's written paid time off policy granted them this discretion:

> Q. Let me go back to the PTO policy, not in relation to Kronos, but you were shown on direct examination General Counsel Exhibit 66, which is the—which was OHL's PTO policy following January 1, 2013. And your testimony was that that document, the policy document, the policy itself does not mandate that PTO requests be made within a specific amount of time prior to the actual requested leave date or time.
>
> A. The policy says it's the discretion of the manager.

It should be noted that this testimony is inaccurate. The Respondent's written time off policy does not state that managers have the discretion to impose any requirement that requests for paid time off be submitted a certain number of hours in advance. Rather, it gives them discretion to grant or deny a request based on workload. Indeed, the written policy implies that there is no time limit for filing such a request:

> Managers have the discretion to approve the request based on workload. If employees are not able to schedule PTO in advance due to unforeseen circumstances, employees should notify their managers as soon as possible.

The second quoted sentence reasonably would be understood to suggest that an employee did not have to file a request any set time in advance and that a request filed at the last minute, due to unforeseen circumstances, would still be considered.

Whether or not Wright's testimony that the "policy says it's the discretion of the manager" is disingenuous, it is not clarifying. Wright further testified as follows:

> Q. Okay. If a manager wished to implement a policy that mandated that employees must provide 48 hours advance notice to use PTO, is that a policy that should--that would typically be reviewed by HR before it's implemented?
>
> A. No, that's a guideline within a certain account. If that's what the manager needs in order to do business, then the manager has that discretion.

Wright repeatedly referred to the 48-hour rule as a "guideline" and denied that it was a "new policy." However, whether called a "guideline" or a "policy," the record establishes that it was new. Manager Maxey testified, in part, as follows:

> Q. Did you tell the employees at a pre-shift meeting about advanced notice of PTO?
>
> A. I probably did, yes.
>
> Q. What would you have—what did you tell them?

> A. Probably what I did in the other two accounts that I was in before that one. I mean, but what brought this on was there was habitual -- the shift ends at 4:45, and somebody would come to me at 4:30 and say I need to be a couple of hours late in the morning, I need to carry my kids to this. And you can't run a business like that, so I just went back to what we were doing in the other accounts. I mean, the PTO policy states, you know, at the manager's discretion on that, so I asked them to give me 48 hours' notice on any PTO.

Although Maxey's testimony suggests that at some point he had implemented a similar rule in other accounts—that is, for employees whose work involved serving other customers—the record does not provide any specific information as to when such changes took place. Maxey's testimony does establish that he announced—or "probably" announced—the rule to employees who had not been subject to it.

Moreover, although Maxey testified that he "asked" employees to give him 48 hours' notice, the written rule, quoted above, indicates not a request but a command. The rule's wording—"this is a must with our new Kronos Time keeping system"—does not indicate that employees were free to disregard it. Additionally, Jones' testimony that Operations Manager Billy Smith explained that his request for paid time off had been denied because it did not comply with a 24-hour rule further indicates a rule rather than a request.

The Respondent argues that warehouse managers have always had discretion to determine how much advance notice employees must give to take paid time off, so the announcement of the 48-hour policy did not amount to a "change." Thus, the Respondent's brief states:

> The General Counsel has not shown that there was any change in the advance notice requirement for employees to request PTO. This has always been a matter of each manager's discretion. Mr. Maxey exercised that discretion when he asked employees for 48 hours' notice of PTO which was his standard practice in the other OHL accounts in which he has worked.

First, it may be noted that word choice sometimes reflects on credibility. Neither the verb "asked," used by Maxey, nor the noun "guideline," used by Wright, conveys the compulsory nature of the action. When someone in authority unilaterally imposes a policy and requires subordinates to comply, he is not "asking" and the policy imposed is more than a "guideline."

Second, the argument that something has "always been a matter of each manager's discretion" must be considered in light of the fact that in a nonunionized workplace managers have plenary discretion which they exercise without having to bargain, but when employees choose a union as their representative, the managers no longer can act unilaterally. Established terms and conditions of employment stay in place when the employees select a union but those terms and conditions do not include a manager's previous ability to make material, substantial, and significant changes in those conditions unilaterally. A manager's power to act unilaterally is not part of the status quo.

Third, calling the promulgation of the 48-hour rule just another exercise of the manager's existing discretion requires a contortion of language and a distortion of fact. In making this argument, the Respondent relies on a sentence in its written paid time office policy: "Managers have the discretion to approve the request based on workload." That provision clearly contemplates that a manager, upon receiving a request for paid time off, will evaluate whether the employee's services are essential to performing the available work. If not, the manager can reject the request.

In other words, this policy contemplates that the manager will make a case-by-case determination, in each instance, as to the effect granting the time off would have on getting the work done. Such a policy is different from promulgating a *new* rule that employees must request leave 48 hours in advance, and then giving managers discretion to waive the rule when the workload allows.

Moreover, the issue of waiving the 48 hour advance notice is a separate question entirely from the effect of the employee's absence on the workload. Manager Maxey's testimony included a description of an instance in which he allowed an employee, Jerry Smith Sr., to take paid time off even though Smith had not submitted his request 48 hours in advance:

> Q. Did you once let Jerry Smith, Sr., take PTO with less than 48 hours' notice?
>
> A. I did.
>
> Q. And what was that situation?
>
> A. He came to me with a day's notice, came to me with a day's notice and said something about his mother was having surgery or something like that, and he wanted to know could he request off to be with his mother during her surgery, and I approved it.
>
> Q. Did you approve that within your own discretion?
>
> A. I did, because I had no one else off on that day, you know; we were good, in good shape, you know, volume-wise.

This argument moves the shells too slowly to conceal the location of the pea. Maxey's conclusion that they were "in good shape, you know, volume-wise," has nothing at all to do with the requirement that the employee submit the request 2 days in advance. Indeed, a manager reasonably would be *less* able to estimate the demands of the work accurately 2 days in advance than would be possible closer to the requested day off.

In sum, I find that Respondent did impose a new procedural requirement that requests for paid time off be submitted 48 hours in advance, which resulted in establishing a new basis upon which such requests could be denied. A manager previously could deny a request because the employee was needed to meet the workload. Now, for the first time, a manager could deny a request as untimely without regard to the workload.

This new 48-hour advance notice requirement, or even a 24-hour advance notice requirement which had not been present before, created an additional burden which, I conclude, is material, substantial, and significant. I recommend that the Board find that the Respondent, by taking this action without affording the Union notice and an opportunity to bargain regarding

the rule and its effects, violated Section 8(a)(5) and (1) of the Act.

The record establishes that this unilaterally-imposed advance notice requirement adversely affected at least one employee, Nathaniel Jones, as discussed above in connection with complaint paragraph 15(d). The unilateral change may also have affected other employees. The identification of such employees and the determination of losses suffered must be deferred to the compliance stage.

Complaint Paragraph 15(g)

Complaint paragraph 15(g) alleges that about June 2013, the Respondent changed its policies concerning employee use of personal time off by informing employees that they would not be allowed to use personal time off on days when the employees are sent home early. The Respondent denies this allegation.

Respondent pays its hourly workers by the hour, and sometimes sends them home if there remains no more work to be done that day. In such instances, an employee's weekly earnings may be less than expected.

Respondent also has a paid time off policy which allows employees to receive pay when they take vacation days. When the Respondent sends an employee home for lack of work, the employee sometimes wishes to use some of this vacation time so that his or her paycheck is not too low to pay his bills. The General Counsel alleges that in the past, the Respondent allowed employees to use accumulated paid time off (PTO) for this purpose, but that it discontinued this policy in about June 2013.

In this instance, Respondent's defense focuses on factual issues and disputes the testimony of the General Counsel's witnesses, particularly Helen Herron and Glenora Whitley. The Respondent's brief states:

> Helen Herron and Glenora Whitley offered muddled testimony that they can no longer use PTO to fill out a day if they leave early. However, [Operations Manager] Quinn Farmer testified that during his entire tenure at OHL, it has been OHL's policy that if employees leave early when there is work available then they cannot use PTO. Moreover, Mr. Farmer testified that Ms. Herron was actually offered a full day's work on June 6, 2014, and June 9, 2014, which is why she was ineligible for PTO.

Farmer's tenure as an operations manager began in September 2011 and Respondent relies on his testimony that at all times thereafter, "it has been OHL's policy that if employees leave early when there is work available then they cannot use PTO." However, even if that statement is true, it misses the point. When work is available, an employee can earn pay by doing it. Rather, the problem arises when work is not available and an employee is sent home.

Additionally, I do not consider the testimony of Herron and Whitley to be as muddled as the Respondent argues. Although Herron appeared to be a nervous witness, she gave understandable testimony which often was uncontradicted. She credibly testified that previously, when Respondent sent employees home for lack of work, it allowed them to use their paid time off, but that this practice changed:

> Q. Do you remember sometime in 2013 finding out that that was no longer going to be allowed?
> A. Yes.
> Q. Do you remember about when that was?
> A. I think it was in May, I think, 17th, something like that.
> Q. Around May?
> A. Um-hum.
> Q. From whom did you find out about this?
> A. From Chris Finley, because we was short of hours that day.
> Q. Okay.
> A. But he said we couldn't use it.
> Q. Okay. So do you remember on that day if there was work available in other accounts or if he was letting people volunteer to go or you could opt to go home?
> A. I didn't know, because he didn't mention it like he did this, you know, lately. He didn't mention that we had work in other places, or you can go to another place. He just said you can go home. So I wanted to use my PTO.
> Q. Okay. Now, did you submit a request to use PTO?
> A. Yes, I did.
> Q. Did you make the request that day or was it later?
> A. I can't remember, but I told him I was going to use PTO, and he said I couldn't.
> Q. When he told you you couldn't, did you ask him why?
> A. He said they no longer allow it.

Respondent has admitted that Finley is its supervisor and agent, but did not call him to testify. Herron's testimony is particularly significant not merely because uncontradicted but also because it describes an incident which leaves no doubt about Respondent's change in its PTO practice. According to Herron, after Finley announced the change, another employee went to the human resources department.

Herron testified that after the other employee contacted human resources, Finley came back and "told us we going to be allowed to use it this time, but after today, no more." Although Finley is a first-line supervisor, the involvement of the human resources department adds further credence to his statement that the policy had changed. I credit Herron's uncontradicted testimony.

Moreover, I do not regard the conflict between the testimony of Manager Farmer and Herron regarding what happened in June 2014 as raising any doubt about Herron's testimony concerning a change that occurred a year earlier. I credit that testimony.

Additionally, Jerry Smith III credibly testified that before the implementation of the Kronos system, the Respondent had allowed employees to use their paid time off to make up for hours not worked when they were sent home, but that Respondent changed this policy. According to Smith, Operations Manager David Maxey announced the change in policy at an employee meeting. Maxey denied making such an announcement:

> Q. All right. Did you ever tell your employees that they could no longer use PTO in order to fill up an eight-hour day?

A. No.

Maxey's testimony did corroborate that of the General Counsel's witnesses on this point: When Respondent sent employees home for lack of work, it had allowed them to use paid time off:

Q. . . .While you've been at that Browne account, have there been days where you've just run out of work?
A. Yes.
Q. Okay. And employees then are either asked if they want to go work on another account, or if they can go home—or they can go home if they want to, right?
A. Yes.
Q. Okay. Now, in those situations, do you know whether there was a practice of allowing employees who wanted to go home to still use PTO so that they can get their full eight hours?
A. On my watch?
Q. Well, yes, start with your watch.
A. Okay. My watch, yes. If they had PTO available, there was no work in any other account, and we had no work in our account, they were allowed to go home, and if they had PTO available, they could make up their hours with it.

According to Maxey, for the Respondent to allow employees to take time off, two conditions had to be met: First, that there was no work for the employee to do in the account to which the employee was assigned, and second, there was no available work in other accounts. However, under those conditions, Respondent allowed its employees to use paid time off to make up for the lack of compensation from working.

Crediting Maxey's testimony on this point, I find that Respondent did allow employees to use paid time off when there was no work available for them in any account. However, I do not believe that a preponderance of credible evidence establishes that Respondent allowed employees to use paid time off when there was work they could do, albeit in another account.

A considerable amount of consistent, credible evidence does establish that sometime in late April or May 2013, the Respondent changed this policy and I so find. Moreover, it can hardly be doubted that the change is material, substantial, and significant. The employees rely on their weekly earnings to pay for food, clothing, housing, and related essential expenses such as utility bills. When those earnings drop below the expected amount, it can cause very serious problems. Allowing the employees to use paid time off as a buffer provided an important benefit.

Respondent has admitted it did not notify or bargain with the Union about the change and its effects before making it. I recommend that the Board find that the Respondent violated Section 8(a)(5) and (1) of the Act.

Complaint Paragraph 15(h)

Complaint paragraph 15(h) alleges that about the end of July 2013, Respondent changed the shift times of two employees in the Receiving Department of the HP account from 7 a.m.—3:45 p.m. to 8 a.m.—4:45 p.m. Respondent denies this allegation.

The facts are not in dispute. Two employees, Anita Wells and Chris Waller began deviating from the normal shift for employees in their group. Wells testified that they discussed it with management and obtained approval to start work at 7 a.m. rather than 8 a.m. and to end work at 3:45 p.m. rather than 4:45 p.m. The arrangement actually was a little more complicated and Wells described it as follows:

> But what we would do is, he would come in, we would swap alternate days. That's so that somebody was always on the floor in the receiving department that was able to do everything. So we pretty much did that, from 7:00 to 3:45.

The "he" to whom Wells referred was Waller, who did not testify. Wells' further testimony indicates that the schedule was even more complicated than described above:

> He would do two days one week; I would do three days that week. And then it would swap the next week. I would do three; and he would do two. But we would always come in at 7:00 on those days that we were supposed to be there.

Although the complaint alleges that Respondent changed their hours in late June, Wells testified that she thought the change occurred in March, but was not entirely sure:

Q. You recall it was around March?
A. I think it was around March. I'm not a hundred percent sure of when it was, but I think—
Q. Okay.
A. —it was around March or April, maybe in June. It was March, I think.

Wells and Waller were working this schedule when Stacy Deal became the operations manager in charge of their account. Deal testified that after she learned of their work hours, she ended their special schedule and required them to work the same hours as the other employees on the shift:

Q. Let's talk a little bit about Anita Wells. You said she's a receiving clerk; is that correct?
A. Correct.
Q. And what was the practice that was going on prior to you ending that practice?
A. She and another individual were coming in just to do some paperwork, get a jump on the paperwork. That way they didn't have to deal with trailers coming in. There was no business need for that. Start time is 8 o'clock.

Whether or not this action violated the Act turns on whether the change was material, substantial, and significant. I conclude that it was not. The record does not establish that the change appreciably increased the burden on Wells or Waller.

Accordingly, I recommend that the Board dismiss the allegations related to complaint paragraph 15(h).

Complaint Paragraphs 15(i), (j) and (k)

Complaint paragraphs 15(i), (j) and (k) all allege that Respondent made unilateral changes on the same day, August 26, 2013. Respondent admits that it made one of the changes, but denies the others.

Respondent denies that it "changed the shift times of the employees in the Shipping Department of the HP account from

four days a week to three days a week," as alleged in complaint paragraph 15(i).

Respondent admits that it "changed the work schedule of the employees in the Shipping Department of the HP account so that they are on separate teams," as alleged in complaint paragraph 15(j).

Respondent denies that it "changed the work schedule of the employees in the Shipping Department of the RP account from 40 hours a week to 33 hours a week," as alleged in complaint paragraph 15(k).

Notwithstanding the denials in the Respondent's answer, Respondent's witnesses admit the relevant facts. Respondent's director of operations, Ken Ball explained that the volume of work for one customer, HP, dropped by at least 20 percent in one year. Ball tentatively attributed the drop to the public's increasing use of the Internet for shopping. The workload also became more sporadic because customers were buying goods online at times when they would not be visiting brick and mortar stores.

Bell met with other managers and decided to split the workforce into two shifts, with employees on each time being assigned to come in 3 days a week and work 11-hour shifts. Although the term "shift" typically refers to the hours worked by a group of employees on a particular day, here, the term "shift" denotes the specific days of the week when employees work. Ball explained:

> Q. The A shift and B shift, what was the A shift?
> A. It's 11 hours a day. Sunday, Monday, and Tuesday is the A shift, and Wednesday, Thursday, and Friday is the B shift.
> Q. Same 11-hour days?
> A. Yes.

Additionally, under the new system, the Respondent allows each employee to sign a sheet indicating they wished to work another day so that the employee has 40 hours of work per week. Operations Supervisor Stacy Deal testified that she always has been able to provide the additional work hours to employees who sign the sheet.

Based on the testimony of Respondent's witnesses, which generally is consistent with other evidence in the record, I find that the government has proven the allegations raised in complaint paragraphs 15(i), (j) and (k).

As noted above, Respondent admits that it did not notify the Union or accord it the opportunity to bargaining regarding the changes and their effects. Having found that the Respondent made the changes, I now consider whether it thereby violated the Act.

Respondent argues that because an employee can sign up to work the additional time, the employees have suffered no loss and, accordingly, the change is not material, substantial, or significant. Respondent also argues that the change is not material, substantial, or significant because if an employee does not wish to work under this system, the Respondent will transfer the employee to other work. Ball testified:

> Q. Now, for employees who might not want to stay in HP with those shifts, did you offer them the ability to go to other accounts?
> A. We did. We told them we had several openings throughout the campus, and if anybody on the team felt like that this was impeding on their lifestyle, their family, we would definitely place them in other accounts, doing similar pick/pack work, and be able to move them. And several of them moved. The others wanted to stay on the A/B shift.

However, even accepting as true the testimony that an employee who wished to work 40 hours a week would have that opportunity by signing the sheet, and even accepting as true that Respondent would transfer unhappy employees to other accounts, I still conclude that the changes were material, substantial, and significant. In reaching that conclusion, I evaluate the facts from the perspective of an employee affected by the changes.

Additionally, in evaluating the materiality and significance of a change, I do not consider whether it is arguably for the better or the worse, because different employees will reach different conclusions on the desirability of the change. That is one reason why it is salutary, as well as legally required, for the employer contemplating such a change to notify and bargain with their representative. The Union is in a unique position to ascertain the reactions of various bargaining unit employees, to determine what course is favored by a majority of them, and also to negotiate changes and accommodations benefiting employees who do not share the majority view.

It should hardly be surprising that, from the viewpoint of the employee, changing his schedule from 40 hours spread over 5 days to 3 nonconsecutive days of working an 11-hour shift, plus some other day, constitutes not merely a material, substantial, and significant change but indeed, a major disruption of the patterns of daily life.

The exclusive bargaining representative alone is in a position to negotiate a change that minimizes the adverse impact and maximizes the benefits. By failing to notify and bargain with the Union about the change and its effects, the Respondent harmed not only the employees' interests but possibly its own as well. Not incidentally, it also broke the law. Therefore, I recommend that the Board find that Respondent violated Section 8(a)(5) and (1) by the conduct alleged in complaint paragraphs 15(i), (j) and (k).

Complaint Paragraph 15(l)

Complaint paragraph 15(l) alleges that about mid-August 2013, the Respondent changed the shift times of the employees in the inventory department in the HIP account from 4 a.m.—12:45 p.m. to 8 a.m.—4:45 p.m. Respondent admits this allegation.

In view of Respondent's admission, and its further admission that it did not notify or afford the Union the opportunity to bargain about the changes alleged in complaint paragraph 15 and their effects, the only remaining issue is whether the unilateral change violated the Act. The Respondent made this change at the same time as the changes, discussed above, affecting shipping department employees. The changes adjusted the work of the inventory employees to the new schedule. However, this explanation does not affect the lawfulness or unlawfulness of making the change unilaterally.

Respondent raises no new argument with respect to these employees which it did not also raise in connection with the allegations discussed above, and I find such arguments unpersuasive here, as well.

Although many employees might welcome a change in the starting time from 4 to 8 a.m., I need not and will not speculate. The issue here is not the arguable desirability of the change but whether it was material, substantial, and significant enough that the employees' representative had to be notified and afforded the chance to bargain. I conclude that it was.

Therefore, I recommend that the Board find that the Respondent violated Section 8(a)(5) and (1) of the Act by the conduct alleged in complaint paragraph 15(l).

Complaint Paragraph 15(m)

Complaint paragraph 15(m) alleges that about September 9, 2013, Respondent announced and implemented changes in its enforcement of rules prohibiting employees from leaving their assigned warehouse during working time without permission from a supervisor. Respondent denies this allegation.

The discussion above concerning complaint paragraph 13(m) touches on many of the same facts relevant here, so it is not necessary to do additional credibility analysis. The credited evidence establishes that at a meeting of employees in early September 2013, Operations Manager Maxey and Human Resources Manager Wright announced that employees would receive discipline if, after clocking in, they left the warehouse without permission.

Notwithstanding Respondent's denial of the allegation, Manager Wright's own testimony establishes the central facts. Respondent has admitted that she is its supervisor and agent. Therefore, the following testimony of Wright may be imputed to Respondent as an admission:

> Q. Okay. Let me clear off your desk a little bit so we can go into something new. Just the GC exhibits. You keep those. Okay. Sometime in September, we're going to a new topic now, did you attend a pre-shift meeting that David Maxey held in the Browne Halco account?
>
> A. Yes.
>
> Q. And did he talk about people clocking in and then leaving the building?
>
> A. Yes.
>
> Q. And what did he say?
>
> A. Basically that if you clock in and leave the building after work time has started, that it's theft of time. It's grounds for termination.
>
> Q. All right. Was this a new policy as far as you were concerned?
>
> A. No.
>
> Q. Has that been the policy as long as you had been at OHL?
>
> A. Yes.
>
> Q. Okay. Did Mr. Maxey say that you--only that you can't leave the building to park your car?
>
> A. No.
>
> Q. He said you can't leave the building?
>
> A. He said you can't leave the building without permission.
>
> Q. Okay. Did you say anything in that meeting about, about discipline?
>
> A. We talked about that it was theft of time and was grounds for immediate termination.
>
> Q. Okay. But again was this anything new?
>
> A. No.

Wright's assertion that the policy was not new forms the basis for Respondent's defense. The Respondent's brief states as follows:

> There was no change in OHL's rule about employees leaving the warehouse without permission. There is no evidence that OHL ever allowed employees to leave the warehouse during non-break times without permission. Rather, OHL reiterated its existing rule in September 2013.
>
> However, complaint paragraph 15(m) does not allege that Respondent implemented a new rule. Rather, it alleges that Respondent announced and implemented changes in enforcement of its existing rules.

Wright's own testimony establishes that Respondent intended to tighten enforcement of its rule because of customer dissatisfaction with the service Respondent's employees were providing:

> The customer didn't feel that our employees were engaged or cared, and so we were really trying to work on building that relationship and making sure that we were doing everything we were supposed to do, that the account was being handled properly. . .

The rule requiring employees to remain in the workplace while on the clock obviously could improve service, but only if enforced. I find that Respondent did announce and implement a stricter enforcement of the existing rule.

The Board has held that a change from lax enforcement of a policy to more stringent enforcement is a matter that must be bargained over. See *Vanguard Fire & Security Systems*, 345 NLRB 1016 (2005), citing *Hyatt Regency Memphis*, 296 NLRB 259, 263–264 (1989), enfd. sub nom. in relevant part *Hyatt Corp. v. NLRB*, 939 F.2d 361 (6th Cir. 1991).

Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify the Union and afford it the opportunity to bargain over the changed enforcement of the rule and the effects of that changed enforcement, as alleged in complaint paragraph 15(m), and recommend that the Board so find.

The identification of employees adversely affected by the unilateral change in enforcement of the rule must be deferred to the compliance stage.

Complaint Paragraphs 16, 17, and 18

Complaint paragraphs 16, 17, and 18 raise allegations that the Union, as the employees' exclusive representative, requested that Respondent provide certain requested information, that the requested information is relevant to the Union's duties as exclusive representative and necessary for that purpose, and that Respondent has failed and refused to furnish it, thereby violating Section 8(a)(5) and (1) of the Act.

Complaint paragraphs 16(a) through (e) allege that since about June 3, 2013, the Union has requested in writing that the Respondent furnish the described information. The Respondent admits each of these allegations.

Complaint paragraph 17 alleges that the requested information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit. Respondent denies this allegation.

Complaint paragraph 18 alleges that since "about June 17, 2013, Respondent, by Karen White, in writing, has failed and refused to furnish the Union with the information requested by it as described above in paragraph 16."

Respondent answered this allegation by stating as follows: "OHL admits that Karen White has not provided the requested information. OHL denies that she is under any legal obligation to do so."

Respondent has admitted that Karen White, its regional vice president, is its supervisor and agent. Therefore, and considering that the complaint alleged that "Respondent, by Karen White" failed and refused to furnish the information, Respondent's admission that Karen White has not furnished the information is tantamount to an admission that Respondent itself had not.

Relevance of the Requested Information

Complaint paragraph 16(a) alleges, and the Respondent admits, that the Union requested full seniority lists with names of bargaining unit employees at each location. Complaint paragraph 16(b) alleges, and the Respondent admits, that the Union requested the date of birth for each employee in the bargaining unit at each location. Complaint paragraph 16(c) alleges, and the Respondent admits, that the Union requested the date of hire for each employee in the bargaining unit at each location. Complaint paragraph 16(d) alleges, and the Respondent admits, that the Union requested the classification and rates of pay for each employee in the bargaining unit at each location. Complaint paragraph 16(e) alleges, and the Respondent admits, that the Union requested the total benefit package (i.e. pension, insurance, vacation, etc.) for each employee in the bargaining unit at each location.

All of this requested information pertains to bargaining unit employees and is presumptively relevant. *Disneyland Park & Disney's California Adventure, Divisions of Walt Disney World Co.*, 350 NLRB 1256 (2007). Nothing rebuts that presumption here. To the contrary, the information requested is precisely the information a union needs to engage in negotiations with an employer and to perform its function as exclusive bargaining representative. I conclude that the General Counsel has proven the relevance and necessity of the requested information.

Respondent's Duty to Furnish

Respondent's brief includes the following sentence to support its argument that it has no duty to furnish the requested information:

> OHL has declined the USW's information request because there is no valid certification, and to the extent that a certification exists, OHL is testing that certification.

However, the Board certified the Union as the employees' exclusive representative on November 17, 2014. *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921. *Disneyland Park & Disney's California Adventure, Divisions of Walt Disney World Co.*, 350 NLRB 1256 (2007).

Accordingly, I recommend that the Board find that, by failing and refusing to furnish the requested relevant information, the Respondent violated Section 8(a)(5) and (1) of the Act.

General Counsel's Motion to Amend Complaint

On the 8th day of hearing, the General Counsel made two motions to amend the complaint based on the testimony of Director of Operations Ken Ball, whom Respondent had called as a witness the previous day. The first motion sought to add the following language to the complaint:

> About May 29, 2013, Respondent, by Director of Operations Ken Ball, at Respondent's facility, on two separate occasions, confiscated and removed pro-Union materials from the employee break room prior to the end of breaks.

The Respondent opposed the motion. In denying the motion on the record, I noted that the General Counsel already had rested, and concluded that the possibility of prejudice to the Respondent outweighed the interest of the prosecution. Upon further consideration after making the unfair labor practice findings discussed below, I believe there is a further reason to deny the motion. Complaint paragraph 7(a) alleged, and the record established, that another of Respondent's managers had engaged in conduct similar to that described in the proposed amendment, and I am recommending that the Board order a remedy for this violation. In these circumstances, adding allegations of similar violations would not affect the remedy. Therefore, I adhere to my decision to deny the motion to add the allegations described above.

The General Counsel also moved to amend the complaint by adding the following language:

> About June, July and August 2013, on dates not more specifically known to the General Counsel, Respondent, by Ken Ball, in the HP account, bypassed the Union and dealt directly with its employees in the Unit by soliciting employee input and proposals concerning work schedule restructuring in the HP account.

During the hearing, I did not rule on this motion but invited counsel to address it in their posthearing briefs, which they have done. The Respondent opposed the motion both during the hearing and in its brief.

Respondent raised an objection that the proposed amendment was time-barred under Section 10(b) of the Act. Respondent also argued that the General Counsel had sufficient information from its witness Anita Wells to have moved to add this allegation before the government rested its case. The General Counsel disagreed with Respondent concerning how much information the government possessed before Director of Operations Ball's testimony.

Respondent further argued that Ball's testimony did not support a direct dealing allegation. At the hearing, Respondent's counsel stated, in part, as follows:

> Further, I disagree with the characterization of what Ken Ball

testified to yesterday. What Ken Ball testified to yesterday was that there were three meetings with employees where this change was discussed with employees, and they listened to what employees had to say. That does not--there--he never testified that they were asking employees whether or not to implement an A shift or a B shift, which is what the General Counsel just said. What he said was that there were meetings with employees to discuss the upcoming change to the A shift and B shift. And last time I checked, the National Labor Relations Act doesn't prevent an employer from discussing with its employees upcoming changes. So I don't think that there's a violation there, even if they were within the 10(b) period, and even if they were properly allowed to amend after they'd closed their case in chief. So for those reasons, we request that you deny the amendment.

The General Counsel disagrees with Respondent concerning the import of Ball's testimony. In a written motion which the government placed in the record later in the hearing, and which supplemented the oral motion, the government argued, in part, as follows: "Ball testified that Respondent conducted meetings with HP account employees for the purpose of soliciting input and proposals from the employees prior to implementing the shift and work schedule changes in the HP account. Thus, the allegation of direct dealing is closely and specifically related to the alleged unlawful unilateral change. . ." Ball's testimony itself included the following:

Q. Did you make some kind of determination that you had to change the shifts for the people in I guess picking and shipping?

A. That's correct.

Q. Is that the correct term to use?

A. Yeah. It was quite evident that it was a real struggle. We were trying to stabilize people's hours to give them enough hours to really be stable in the account, earn 40 hours' worth of work. So because of the fluctuating volume from day to day, it would run as high as 6-, 7,000 on a Sunday, and as high as 3,500 orders a day on a Wednesday. So we beat around --

Q. That's how many orders you can pick?

A. Yes.

Q. And ship out?

A. Yes. And so we ran different scenarios as to how we could best come up with a more creative shift so that everybody would get their 40 hours. We came up with the A/B shift. And asked several employees about it with the guys, see what they thought about it. We thought it was a good fit for them so they'd get their 40 hours, and we're able to stabilize the business as well. And so that's kind of where it all generated from.

As the Board stated in *Permanente Medical Group, Inc.*, 332 NLRB 1143 (2000), the criteria to be applied in determining whether the Respondent has engaged in direct dealing under Section 8(a)(5) are enumerated in *Southern California Gas Co.*, 316 NLRB 979 (1995). They are: (1) that the Respondent was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union. Additionally, the Board considers whether the employer's direct solicitation of employee sentiment over working conditions is likely to erode the union's position as exclusive representative. *Armored Transport, Inc.*, 339 NLRB 374 (2003); *Allied-Signal, Inc.*, 307 NLRB 752, 753 (1992); *U.S. Ecology Corp.*, 331 NLRB 223 (2000), enfd. 26 Fed.Appx. 435 (6th Cir. 2001).

The record clearly establishes that the Respondent was communicating directly with union-represented employees. With respect to the second criterion, even in the absence of specific testimony concerning when and where the meetings took place and who was present, it would surprise me greatly if the Respondent had invited union representatives in and served them donuts. However, from Ball's testimony it is not even clear that formal meetings, as such, took place and it is possible that Ball merely was describing casual hallway conversation. In any event, considering Respondent's consistent refusal to deal with the Union, it would seem very likely that the Union was not present at such discussions.

As to the second criterion, it is not possible to reach a conclusion, based on Ball's testimony, about the purpose of the discussions. The record is insufficient to establish whether the true purpose of the discussions was merely to obtain information useful in planning the contemplated scheduling changes, or whether the actual purpose was to establish the actual schedule changes. Ball's testimony suggests the former, but I would wish a much fuller record before reaching any conclusion.

The General Counsel's motion notes three factors relevant to determine whether the motion to amend should be granted: (1) Whether there was surprise or lack of notice; (2) whether the General Counsel offered a valid excuse for the delay in moving to amend; and (3) whether the matter was fully litigated. *Cab Associates*, 340 NLRB 1391, 1397 (2003). Here, the third factor is dispositive. The present record includes only the sketchiest outline of what may have happened during these discussions. It does not include information establishing either when and where the discussions took place or who was present.

Moreover, the present case includes a remarkable number of conflicts in the testimony, far more, it seems, than usual. Witnesses even disagreed about the color of the vehicle a manager was driving, one witness testifying it was red and the other that it was green. In such a context, "fully litigated" must certainly require more evidence than Ball's brief testimony.

Additionally, a direct dealing allegation raises an issue regarding the purpose or motive which a unilateral change allegation does not. For all these reasons, I conclude that the issue was not fully litigated. Therefore, I deny the General Counsel's motion to amend.

Summary of Unfair Labor Practice Findings

Considering the length of the record, and of this decision, the following summary of my findings and conclusions concerning the unfair labor practice allegations may be helpful.

Complaint Para. No	Merit	No Merit	Section Violated
6(a)		X	
6(b)		X	
7(a)	X		8(a)(1)
7(b)		X	
7(c)		Withdrawn by General Counsel	
7(d)		Withdrawn by General Counsel	
8(a)		X	
8(b)		X	
9(a)		X	
9(b)	X		8(a)(1)
9(c)	X		8(a)(1)
9(d)		X	
10(a)	X		8(a)(1)
10(b)		X	
11(a)-11(c)		X	
12(a)-12-(c)		X	
13(a)		X	
13(b)		X	
13(c)		X	
13(d)		X	
13(e)		X	
13(f)		X	
13(g)		X	
13(h)	X		8(a)(3); 8(a)(1)
13(i)		X	
13(j)		X	
13(k)		X	
13(l)		X	
13(m)		X	
13(n)		X	
14(a)		Unit Is Appropriate	
14(b)		Board Certified Union	
14(c)		Union is 9(a) Rep.	
15(a)		X	
15(b)		X	
15(c)		X	
15(d)		X	
15(e)	X		8(a)(5), 8(a)(1)
15(f)	X		8(a)(5), 8(a)(1)
15(g)	X		8(a)(5), 8(a)(1)
15(h)		X	
15(i)	X		8(a)(5), 8(a)(1)

15(j)	X		8(a)(5), 8(a)(1)
15(k)	X		8(a)(5), 8(a)(1)
15(l)	X		8(a)(5), 8(a)(1)
15(m)	X		8(a)(5), 8(a)(1)
16(a)-16(e)		Union's Information Requests	
17		Information Is Relevant / Necessary	
18	X		8(a)(5), 8(a)(1)
15(p)		X	

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix A.

The General Counsel also seeks an order requiring that the Notice to Employees be read to employees by the Respondent during working time. Such an order is consistent with previous Board orders. In *Ozburn-Hessey Logistics, LLC*, 359 NLRB 1025, the Board stated, in part:

> Given the multiple violations committed by the Respondent in *Ozburn I*, *Ozburn II*, and this case, we agree with the judge that a notice reading remedy is appropriate. A reading of the notice will help to assure employees that they may freely exercise their Section 7 rights in the future. We will conform this requirement, however, to our established practice of affording a respondent the option to have its managers, here Coleman and Smith, read the notice aloud to employees in the presence of a Board agent.

359 NLRB 1025, 1027 (footnotes omitted).

The Board similarly included a notice reading remedy in *Ozburn-Hessey Logistics, LLC*, 361 NLRB 1, 1 fn. 4. Respondent has not yet remedied its unfair labor practices found in the previous cases and the need for a notice reading remedy remains.

Additionally, the Respondent must allow the bargaining unit employees' certified exclusive representative, on request, to attend the notice reading and to audio-video record it so that it may be viewed by employees not then present or subsequently hired. Because the Respondent has persisted in committing unfair labor practices over a period of years, notwithstanding the Board's orders to cease and desist, and because the Respondent has failed to remedy its past unfair labor practices notwithstanding the Board's orders to do so, the lingering toxic effect of these violations potentially could discourage employees from joining the Union or engaging in union activities well into the future. An audio-visual recording of the reading of the notice would provide continuing assurance to employees that they may form, join, or assist a labor organization without fear of retaliation.

Further, to remedy the serious unfair labor practices found herein, the Respondent must offer employee Stacey Williams' immediate and full reinstatement to his former position or, if that position is no longer available, to a substantially equivalent position. It must also make him whole, with interest, for all losses he suffered as a result of Respondent's unlawful discrimination against him. Additionally, I recommend that the Board order the Respondent to compensate the discriminatee for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

Further, Respondent must expunge from its files all references to the unlawful discharge of Williams.

Respondent must also provide the Union, without further delay, the information it has been requesting since June 3, 2013, as described in complaint paragraphs 16(a) through (e).

Additionally, Respondent must rescind the unlawful unilateral changes in working conditions, as found above, and restore the status quo which existed before it made those changes. It also must make employees whole, with interest, for all losses suffered because of the unlawful changes and take such other action as may be necessary to remedy all adverse consequences. The identification of the employees and determination of the specific remedy due each are appropriate matters for the compliance stage.

The General Counsel also seeks an order requiring Respondent to bargaining in good faith with the Union, on request, for the period required by *Mar-Jac Poultry*, 136 NLRB 785 (1962). The Respondent's extensive history of unfair labor practices warrants such an order. In reaching this conclusion, I note that the election on which the Board based its Certification of Representative took place on July 27, 2011, and that the revised tally of ballots issued on May 14, 2013.

Further, I note the previous recent Board decisions finding that Respondent has committed numerous violations of the Act in response to the Union's organizing campaign. *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1456 (2011); *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632 (2011); *Ozburn-Hessey Logistics, LLC*, 359 NLRB 1025 (2013); and *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921 (2014). Therefore, I recommend that the Board construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Pac Tell Group, Inc. d/b/a U.S. Fibers*, 362 NLRB No. 4, slip op. at 2 (2015).

IV. CONCLUSIONS OF LAW

1. The Respondent, Ozburn-Hessey Logistics, LLC, is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The Charging Party, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC a/k/a United Steelworkers Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by confiscating and removing prounion materials from the employee break room prior to the end of breaks; by ordering employees engaged in lawful union solicitation and distribution activities to leave the premises; by telling employees that they should quit their employment with the Respondent and find different jobs if they had complaints about Respondent or otherwise engaged in protected concerted activities; by informing employees that they are not represented by the Union; by discharging its employee Stacey Williams because he engaged in Union or other protected concerted activities and to discourage other employees from engaging in such activities; by implementing a mandatory exercise and stretching program without first notifying the Union and

affording it the opportunity to bargain about the decision and its effects; by implementing a requirement that employees provide advance notice of 24 or 48 hours when requesting the use of personal time off without first notifying the Union and affording it the opportunity to bargain about the decision and its effects; by changing its policies concerning employee use of personal time off by informing employees that they would not be allowed to use personal time off on days when the employees are sent home early without first notifying the Union and affording it the opportunity to bargain about the decision and its effects; by changing the shift times of the employees in its shipping department from 4 days a week to 3 days a week and by changing their work schedule, resulting in the employees being divided into separate teams with employees being reduced from working 40 hours a week to 33 hours a week without first notifying the Union and affording it the opportunity to bargain about the decision and its effects; by changing the shift times of inventory department employees without first notifying the Union and affording it the opportunity to bargain about the decision and its effects; by announcing and implementing changes in its enforcement of rules prohibiting employees from leaving their assigned warehouse during working time without permission from a supervisor without first notifying the Union and affording it the opportunity to bargain about the decision and its effects; and by refusing to furnish the Union with information it requested which was relevant to the Union's performance of its duties as the employees' exclusive bargaining representative and necessary for that purpose.

4. The Respondent violated Section 8(a)(3) of the Act by discharging its employee Stacey Williams because he engaged in union or other protected concerted activities and to discourage other employees from engaging in such activities.

5. The Respondent violated Section 8(a)(5) of the Act by implementing a mandatory exercise and stretching program without first notifying the Union and affording it the opportunity to bargain about the decision and its effects; by implementing a requirement that employees provide advance notice of 24 or 48 hours when requesting the use of personal time off without first notifying the Union and affording it the opportunity to bargain about the decision and its effects; by changing its policies concerning employee use of personal time off by informing employees that they would not be allowed to use personal time off on days when the employees are sent home early without first notifying the Union and affording it the opportunity to bargain about the decision and its effects; by changing the shift times of the employees in its shipping department from 4 days a week to 3 days a week and by changing their work schedule, resulting in the employees being divided into separate teams with employees being reduced from working 40 hours a week to 33 hours a week without first notifying the Union and affording it the opportunity to bargain about the decision and its effects; by changing the shift times of inventory department employees without first notifying the Union and affording it the opportunity to bargain about the decision and its effects; by announcing and implementing changes in its enforcement of rules prohibiting employees from leaving their assigned warehouse during working time without permission from a supervisor without first notifying the Union and affording it the opportunity to bargain about the decision and its effects; and by refusing to furnish the Union with information it requested which was relevant to the Union's performance of its duties as the employees' exclusive bargaining representative and necessary for that purpose.

6. The Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[16]

ORDER

The Respondent, Ozburn-Hessey Logistics, LLC, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Confiscating and removing prounion material from the employee break room prior to the end of breaks;

(b) Ordering employees engaged in lawful union solicitation and distribution activities to leave its premises;

(c) Telling employees that they should quit their employment with the Respondent and find different jobs if they had complaints about Respondent or otherwise engaged in protected concerted activities;

(d) Informing employees that they are not represented by the Union;

(e) Discharging employees because they engaged in union or other protected concerted activities or to discourage other employees from engaging in such activities;

(f) Making unilateral changes in terms and conditions of employment which are mandatory subjects of bargaining without first notifying the Union and affording it the opportunity to bargain over the decision and effects, including the following such unilateral changes: implementing a mandatory exercise and stretching program, implementing a requirement that employees provide advance notice of 24 or 48 hours when requesting the use of personal time off, changing its policies concerning employee use of personal time off by informing employees that they would not be allowed to use personal time off on days when the employees are sent home early, changing the shift times of the employees in its shipping department from 4 days a week to 3 days a week and changing their work schedule, resulting in the employees being divided into separate teams with employees being reduced from working 40 hours a week to 33 hours a week, changing the shift times of inventory department employees, and announcing and implementing changes in its enforcement of rules prohibiting employees from leaving their assigned warehouse during working time.

(g) Refusing to furnish the Union with information it requested which was relevant to the Union's performance of its

[16] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

duties as the employees' exclusive bargaining representative and necessary for that purpose;

(h) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employee Stacey Williams immediate and full reinstatement to his former position or to a substantially equivalent position.

(b) Make Stacey Williams whole for any loss of earnings and other benefited suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(c) Submit appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate calendar quarters and/or reimburse Williams for any additional Federal and State income taxes he may owe as a consequence of receiving a lump-sum backpay award in a calendar year other than the year in which the income would have been earned had the Act not been violated. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Stacey Williams and, within 3 days thereafter, notify in writing that this has been done and that the discharge will not be used against him in any way.

(e) Within 14 days from the date of this Order, rescind the unlawful unilateral changes found in this decision and described in paragraph 1(f), above, restore the status quo existing before these unilateral changes, and fully remedy all adverse effects these unilateral changes caused to employees, including making them whole, with interest computed as described above. In complying with this paragraph, Respondent also shall take the steps described above in paragraph 2(c).

(f) Within 14 days from the date of this Order, furnish the Union with the information which the Union requested, as described in this decision and referred to above in above in paragraph 1(g).

(g) Within 14 days after service by the Region, post at its facilities in Memphis, Tennessee, copies of the attached notice marked "Appendix."[17] Copies of the notice, on form provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, noticed shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 2013. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(h) Within 14 days after service by the Region, hold a meeting or meetings at each of the facilities where bargaining unit employees work, during working hours at times to assure the widest possible attendance, at which the attached notice marked "Appendix A" is to be read to the unit employees by either Senior Vice President Randall Coleman or Senior Employee Relations Manager Shannon Miles in the presence of a Board agent, or, at the Respondent's option, by a Board agent in such officials' presence. Upon the request of the Charging Party Union, in its capacity as the employees' exclusive bargaining representative, the Respondent shall allow officials designated by the Union to attend such meetings and to make audio-video recordings of the reading of the Notice.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. April 28, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT confiscate or remove prounion literature from the employee break room before the end of breaks.

WE WILL NOT order employees engaged in lawful union solicitation and distribution activities to leave the premises.

WE WILL NOT tell employees that they should quit their jobs or find other work if they have complaints about us or are engaged in union or other protected concerted activities.

WE WILL NOT tell employees that they are not represented by the Union.

WE WILL NOT discharge employees because they engaged in union or other protected concerted activities or to discourage others from engaging in such activities.

WE WILL NOT make changes in terms and conditions of employment which are mandatory subjects of bargaining without first notifying the Union and affording it the opportunity to bargain over the decision and effects, including the following such unilateral changes: implementing a mandatory exercise and stretching program, implementing a requirement that employees provide advance notice of 24 or 48 hours when requesting the use of personal time off, changing its policies concerning employee use of personal time off by informing employees that they would not be allowed to use personal time off on days when the employees are sent home early, changing the shift times of the employees in its shipping department from 4 days a week to 3 days a week and changing their work schedule, resulting in the employees being divided into separate teams with employees being reduced from working 40 hours a week to 33 hours a week, changing the shift times of inventory department employees, and announcing and implementing changes in its enforcement of rules prohibiting employees from leaving their assigned warehouse during working time.

WE WILL NOT refuse to furnish the Union with information it requested which was relevant to the Union's performance of its duties as the employees' exclusive bargaining representative and necessary for that purpose.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Stacey Williams immediate and full reinstatement to his former position or to a substantially equivalent position should his former position not be available.

WE WILL make Stacey Williams whole, with interest compounded daily, for all losses he suffered because we unlawfully discharged him.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharge of Stacey Williams.

WE WILL rescind the unilateral changes described above, restore all affected terms and conditions of employment which existed before we made the unlawful changes, and make whole, with interest, all employees who suffered losses because of these changes.

WE WILL furnish the Union with the information it requested which is necessary and relevant to performing its duties as our employees' exclusive bargaining representative.

OZBURN-HESSEY LOGISTICS, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-097046 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.